Supreme Court
FILED
AUG 7 - 2008
OFFICE OF THE CLERK

No. 08 882

IN THE

Supreme Court of the United States

MAUREEN O'DWYER, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MAUREEN O'DWYER
pro se

5939 Vicksburg Street,
New Orleans, LA 70124
(504) 484-1053

CURRY & TAYLOR • (202) 393-4141

QUESTIONS PRESENTED

1) Whether Petitioner has been denied the fundamental constitutional right to due process of law by virtue of the fact that the District Judge presiding over "Victims of KATRINA" litigation is guilty of actual bias and prejudice, and should have been recused for that reason, and for other reasons, in order to avoid even the appearance of impropriety.

2) Whether the filing of motion(s) to dismiss by the United States of America to invoke sovereign immunity pursuant to §702(c) of the Flood Control Act of 1928, as well as the due care and discretionary function exceptions to the waiver of sovereign immunity contained in the Federal Tort Claims Act, constituted denials of Petitioner's claims or otherwise rendered any "requirement" (which is assumed for argumentative purposes only) that Petitioner must exhaust administrative remedies under the FTCA as a prerequisite to filing suit futile?

3) Whether the Corps of Engineers' and/or FEMA's failure to establish competent procedures or to make any meaningful effort to adjust administrative claims submitted to them since Hurricane KATRINA pursuant to the FTCA and/or the Admiralty Extension Act rendered administrative claim procedures as a prerequisite to filing suit futile?

4) Whether the Learned District Judge abused his discretion by not allowing Petitioner to amend her

pleadings in order to invoke admiralty and maritime jurisdiction, such that the Suits in Admiralty Act is applicable, which contains no administrative claim requirement?

5) Whether the Federal Judiciary has the inherent power to fashion some equitable remedy for Petitioner under the unique circumstances presented by "Victims of KATRINA" litigation, which would allow Petitioner to avoid the unduly burdensome administrative claims requirements of the FTCA and the Admiralty Extension Act, which the Federal Government hasn't bothered to implement in any meaningful way, anyway?

6) Whether Petitioner's civil rights claims against State and Local government entities and individuals were erroneously dismissed, "on the papers", without the opportunity for any discovery or for one word to be uttered on cross-examination, under oath, by public officials?

7) Whether the State of Louisiana, its branches of government, agencies and instrumentalities, political subdivisions and individual department heads have waived immunity from being required to litigate claims brought against them in Federal Court pursuant to the 11th Amendment to the U.S. Constitution, including particularly, but without limitation, waiver "by litigating conduct" in the Federal forum by voluntarily invoking the jurisdiction of the United States District Court for the Eastern District of Louisiana on multiple occasions since August 29, 2005. See Gil Seinfeld, "Waiver-in-Litigation: Eleventh Amendment

Immunity and the Voluntariness Question", 63 Ohio State Law Journal 871 (2002).

8) Whether Petitioner's tort-based claims against State and Local government entities and individuals were erroneously dismissed "on the papers", without the opportunity for any discovery or for one word to be uttered on cross-examination, under oath, by public officials?

9) Whether the Federal Court has jurisdiction over Petitioner's claims by virtue of Federal pollution statutes, and by virtue of the claims against the Government in the nature of set-off against future tax liability?

10) Whether the Learned District Judge abused his discretion by failing to exercise supplemental jurisdiction over Petitioner's tort claims against the non-federal defendants?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1 (b), the following list identifies all of the parties appearing here and before the United States District Court for the Eastern District of Louisiana and before the United States Court of Appeals for the Fifth Circuit.

PETITIONER:

Maureen O'Dwyer

RESPONDENTS:

The United States of America, Louisiana State Governor Kathleen Blanco, The State of Louisiana, Mayor Ray Nagin, The City of New Orleans, Chief of Police Eddie Compass, Jim Huey, President of the Orleans Parish Levee Board, The Orleans Parish Levee Board, Ray Nagin, President of The Orleans Parish Sewerage and Water Board, The Orleans Parish Sewerage and Water Board, Marlin Gusman, Orleans Parish Criminal Sheriff, ABC and DEF and XYZ Insurance Company, who insured above defendants[1]

Alexis O'Dwyer Navarro, Shirley D. O'Dwyer, Lisa Marie O'Dwyer, Harold Joseph Gagnet, Sally Egerton Richards, Shane Porter and Stephanie Porter, Interior Specialties LLC, Shelia Jones Jordan, Charles Edward Jordon, Wayne M. Jones, Gloria Agnes Griffin,

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1 The named defendants originally included Eddie Jordan, District Attorney for the Parish of Orleans, and Kimberly Williamson Butler, Clerk of Court, Criminal District Court for the Parish of Orleans. However, Petitioners' claims against defendants Jordan and Butler be and they are hereby abandoned.

individually and as Administration of the, Succession of her brother Stephen Williams, and on behalf of any and all heirs, survivors, relatives and beneficiaries of the deceased Leticia Brown, Jo Anna McLean, Lee Davidson McLean III, Kathryn Frank, Richard Springer Favor, And Miriam McMichael Favor d/b/a The Garden Smith, Philip B. Alford, Gerald Pipes Guice, Beverly Anne Ferguson Guice, Madeleine Alise Guice, Kenneth Hastings Guice, Anthony Phillip Hende4rson, Louis Joseph O'Dwyer, Jr., Maurleen M. O'Dwyer, Aaron Jacob O'Dwyer, Henry Grady Hardy, Jr., Letizia Hardy, Jane Veronica Hardy, Brian Southerland Hardy, Martin Ramos, Richard Ehret, Leslie Ehret, Anthony Phillip Henderson, Frances Y. Bellerino, Louise J. Young, Edward R. Young And Veronica F. Young d/b/a Floor Crafters Wood Interiors, Joseph Rauchwerk, Cheryl Sweat Rauchwerk, Marilyn Von Schmidt, Susan G. Jeanfreau, M.D., Wallace E. Jeanfreau, M.D., Robert J. Jeanfreau, M.D., Jerry Victor Jacob, Gloria Pohlman Hecker, Joseph W.P. Hecker, in proper person, Nicholas S. Lindner, Ruth B. Ragas, Paul J. Ragas, Jason P. Ragas, Walter J. Morgan, Katie L. Ragas, Arthur Tracy Abel, Kathleen C. Abel, Kitty B. Hoffman, Craig Anthony Miller, Stephen Christopher Jeandron, Andre Trevigne Fowler, John Wesley Stewart, Jr., George Schmidt db/a The George Schmidt Gallery, Delia LaBarre, Tyrone Anthony Alexander, Michael Cormick, Penny Anderson, Calie Newell, Betty Francis, Lester McGee, Sherman Griffin, Sandra Meyers, Gregory Cormick, Jeffrey Baker Day, Ashley O'Dwyer Day, Harold Alexander, Vonola Avist, Dana Bell, Gloria Mae Bell, Hitchai Bryant, Nicole Bryant, John Collins, Jonell Collins, Catherine Collins, Sherene Collins, Simeko Collins, Jerry Cormick, Lauren Dabney, Kevin Daliet,

Norcille Daliet, Donald Ellis, Kim Ellis, Bobbie Evans, Audrey Gray, Lucille Gray, Issac Hayes, Mary Johnson, Mary Noela Johnson, Wayne Anthony Johnson, Ann Lawless, Detective Carlton Lawless, Gene Lee, Ivin Lee, Lynn Lee, Jimmie Martin, Harry Nobles, Alma Sanders, Barbara Sanders, Albertha Skinner, Gilda Skinner, Irinika Skinner, Irvin Skinner, Brandon Smith, Felix Augustin, Pauline Augustin, Cynthia Bell, Rhona Causey, Winnette Lang, Ferdinand Leon, Lydia Leon, Caroll Denesse, Lucien Denesse, Ashley Navarre, Doreine Navarre, Melvin Navarre, Sylvia Byrd, William Byrd, Blair Bundy, Dawn Bundy, Jill Bundy, John Collins, Sherlene Collins, Janice Collins, on her own behalf and on behalf of her son, John Henry Collins, Jamie Collins, on her own behalf and on behalf of her son, Jacobi Glover, Mitchell Armour, Vanessa Carter, Kerry Carter, Joshua Billon and his spouse, Monica Billon, on their own behalf and on behalf of their minor Children, Isaiah Billon and Monica Billon, Betty Christy, De-Fean Christy, La-Shawn D. Robinson, Patricia Granger, on her own behalf and on behalf of her daughter Tomika Edwards, Charmeine Jefferson, on her own behalf and on behalf of her children, Lemor James, Ariel James, Yolanda Jefferson, and Erika Thornton Chris McCormick, Michele Armour, Monique Armour, Mitchell Armour III, Augustine Greenwood Rosemary Greenwood, on her own behalf an don behalf of her children, Yasemine and Jasemine Greenwood, Byrne Sherwood, Linda Morgan, Lokea Morgan, Denisha Morgan, Shelia Smith, Jacqueline Smith, James Smith Jr., Nina Baughn, on her own behalf an don behalf of her minor child, Karim Kemp, Karen Kemp, Erica Kemp, Patricia Green Tanaka Johnson, Bobby Johnson, Charles Williams, Laura Recasner, on her own behalf and on behalf of her children, Dajohon

Recasner, Kurshell Recasner and Charleston Recasner, Agnes Recasner, Charmaine Rhome, Judy Starks, Insuk Caro d/b/a Wig Fashions and Apolostic Christian Bookstore, Troylyn Washington, Mercedes Washington, Shanika Taylor, Marsha Taylor, Erica Kemp, Karen Kemp, Dawn Bundy, on her own behalf and on behalf of her minor children, Emanuel Bundy, Shekinah Bundy, Jane Bundy, and Blair Bundy, Jr. Roxchell Panika Santee', on her own behalf and on behalf of her minor son, Tyree Santee', Samuel Bourne, Nicole Bryan, Alton J. Crowden, on his own behalf and on behalf of his minor children, Cameron Crowden and Kelli Crowden, Ashley Navarre, Shana Patterson, Keana Quinn, Niketsa Ramsey, on her own behalf and on behalf of her minor children, Desmonisha Ramsey, Kenyel Rochon and Desmond Ramsey, Darylynn Ramsey, Julie Ramsey, on her own behalf and on behalf of her minor children, Dalisha Ramsey and Charli Ramsey, Robert Rhone, Joshua Smith, Cynthia Tibbet, on her own behalf and on behalf of her children, Brittany Tibbet, Sidney Tibbet, Chelesa Tibbet, and Janice Tollins, on her own behalf and on behalf of her minor son, John Tollins, Glenda Medina, Michele Elizabeth Omes, Jim Richard Pazos, Avery Scott, Frank Duncan Macpherson Strachan III, Joshua Dillon and his spouse, Monica Dillon, on their own behalfs and on behalf of their minor children, Isaiah Dillon and Monica Pollard, Donald G. Deaton, Pamela A. Morgan, Frank Butler, Jr., on his own behalf And on behalf of his minor children, Frank Butler III, Charles Butler and Tachmonite Butler, Lorenzo Butler, Alonzo W. Butler and his spouse, Laquinta Butler, on their own behalfs and on behalf of their minor children, Alonzo W. Butler, Jr., Jasmyn Butler, and Rashaad Butler, Rita Bailey, Tony Green, Lina Vaughn, William Byrd, Sylvia

Byrd, Ruth Harris, Clifford Harris, Jonathan Washington, Vicky Michel, Simon Kleindorf, Bertha Kleindorf, David Kleindorf, Connie Kleindorf, Troylyn Washington, on her own behalf and on behalf of her minor child, Dasia Washington, Mercedes Ann Washington, Roy Junior Washington, Tony Green, Eva McGee, Levi Johnson, Patricia Johnson, Lequecia Bunn, on her own behalf and on behalf of her minor child, Jada Gibson, Imelda Johnson, Michael Johnson Mulkina Coates, on her own behalf and on behalf of her minor children, Keshina Coates and Malik Coates, Benjamin Morgan, Chandra Maxon, on her own behalf and on behalf of her minor children, Byron Maxon, Darianne Maxon, Janea Maxon, Willie Maxon, Devante Maxon, and Chandray Maxon, Marylyn Maxon, on her own behalf and on behalf of her minor children, Shancanacia Maxon, Ravanell Maxon, and Robert Maxon, Lois Torregano, Loisha Breaux, on her own behalf and on behalf of her minor children, Loishell Williams and Mikayla Breaux, Vanesa Davis, James Cook, Daniel Davis, Joan A. Miller, Linda Boyd, on her own behalf and on behalf of her minor children, Caress Boyd, and Charles Boyd, Elijah Washington, Keineisha Richard, on her own behalf and on behalf of her minor children, Marlon Richard, Marcel Richard, and Emyjah Washington, Anthony Barnes, Janice Barnes, Shena Barnes, Falish Barnes, Melanie Barnes, Darryle Lee Johnson, Sr., Tameko Benjamin, on her own behalf and on behalf of her minor children, Jovana Benjamin, Darione Benjamin, Darryle Lee Johnson, Jr., and Darielle Benjamin, Delilah Milton, Kimmie Ferdinand, Ashley Ferdinand, Cornell Batiste, James Hollins and his wife, Lakvina Coates, on their own behalf and on behalf of their minor children, Semaj Hollins, and Jamaya Hollins, Tamaya Coates, Maria Washington, on

her own behalf and on behalf of her minor children, Janisha Washington, Andrew Washington, Charles Washington, and Mekhi Washington, Andrew Hill, Leslie Johnson, on her own behalf and on behalf of her minor child, Jamay Johnson, Lakeisha Fernandez, on her own behalf and on behalf of her minor child, Eddie McGee, Jr., Lessie Johnson, Zelda McKendall, Ellsworth P. McKendall, Kimberly McKendall, Michael McKendall, Russell Gardner, Winnette Lang, on her own behalf and on behalf of her minor children, Kavon Lang, and Lashanice Jones, Lisa Byrd, on her own behalf and on behalf of her minor child, Sadzisya Byrd, Michael Anthony Snipes, Jr., JoAnn Snipes, Michael A. Snipes, Sr., Garry Bougeois, Cheryl Bernard, Johndra Patterson, Terrill Morris, Dianne Thompson, Michael Thompson, Ruby Ann Washington, on her own behalf an don behalf of her minor children, Shaune Bakewell, and LaShay Johnson, Victor Moore and his wife, Pamelyn Morgan Moore, on their own behalfs and on behalf of their minor children, Victor Lyn Morgan, Pamelor Morgan, Vicknesha Morgan, and Victoria Moore, Ruby Ann Washington, on her own behalf and on behalf of her minor children, Shaune Bakewell, and LaShay Johnson, David Bealer, Roseann Bealer, Stacy Bealer, Roland Rodrigue, Cheryl Rodrigue, John Elmer Smith, Wanda Jean Smith, Robin Marie Smith, Linda R. Breaux, Larry Robert Reinhardt, Rosa A. Reinhardt Robert E. Stone, Linda Dufrene, Maria Thecla Eugenia Albers, New Orleans Montessori School, Inc., Josephine J. Dupree-Dean, Herbert C. Jackson, Gail Brown, on her own behalf and on behalf of her minor children, Aaron Pulliam and Brandon Pulliam, Myron Mack, Sheila Lewis, Pernell Lewis, Ashanti Lewis, Natasha Leevis, on her own behalf and on behalf of her minor children, Natiasha Lewis and Shaila Lewis,

Christoopher Patterson, and his spouse, Linda Johnson, on their own behalfs and on behalf of their minor children, Christopher Edward Patterson, Jr. and Chrisha Patterson, Shanipa Patterson, on her own behalf and on behalf of her minor children, Sherman Singleton, Shermont Singleton and Reggineka Rice, Sharie Johnson, Rachel Johnson, Joan Bundy, Michelle Renee' Alexander, Rodney James, on her own behalf and on behalf of his minor children, Rodney James, Jr. and Alexis James, Robert Young, Cornelius Young, Shactha (spelled phonetically) Williams, Rose Marie Young, Tykesha Arington, on her own behalf and on behalf of her minor children, Charles Arington, Tyriel Arington and Braione Arington, Lloyd Joseph, Juanita Arington, PTC Petroleum & Industrial Supplies, Inc., Ronald D. Pitisci, Kathleen Pitisci, Gerald Anthony Picquet, Lynn Picquet, Darnell Williams, on her own behalf and on behalf of her minor child, Chad Williams, Anthony Barnes, Janice Barnes, Falisha Barnes, Shena Barnes, Melanie Barnes, Glennis Livas, on her own behalf and on behalf of her minor child, William E. Patterson, Malika Batiste, on her own behalf and on behalf of her minor niece and nephew, Caliyah Porter and Aaron Batiste, Christopher Arrington, Noema Arrington, on her own behalf and on behalf of her minor children, Eric Arrington and Aaron Arrington, Phillip Martin, Paulette Biggs, on her own behalf and on behalf of her minor child, Arkasia McFarland, Aldo Gofredo Hernandez, Sr., and his spouse, Areli Carlota, Hernandez, on their own behalf and on behalf of their minor child, Emmanuel Goffredo Hernandez, Aldo Gofredo Hernandez, Jr., Lloyd Loup III, Alaina Loup, Kenneth Arcement, Marlene Arcement, Shanika Taylor, Marsha Taylor, Erica Kemp, Latonya Caldwell, on her own behalf and on behalf of her minor children,

Onyell Caldwell and Charles Dears, Larose Taylor, Stephan Sawyer, Ms. Eprsy Livas, Brandon Livas, Clifford Coates, Tammie Chattman, on her own behalf and on behalf of her minor children, Rudarion Chattman, Randel Chattman, and Joseph Chattman, Linzie Brown, Emargie C. Brumfield, Leonard Brumfield, Brandon Carr, Jessie Arbuthnot, Mary P. Mingo, Rachel Goldsmith, Gayle LeBlanc, Michael LeBlanc and his spouse, Larice Taylor LeBlanc, on their own behalfs and on behalf of their minor child, Mika Jane LeBlanc, Kim Gaines, on her own behalf and on behalf of her minor children or grandchildren, Jamechia Smith, and Diamond Beam, Michael Gaines, William B. English, Jr., Rosaria English, Hazel McGuire, Mary H. Johnson, Jerry Matthews, Dennis Jones, Jr., Raquel Roth, on her own behalf and on behalf of her minor children, Dennis Jones III and Kellie Ann Jones, Linda Roth, Toya Roth, on her own behalf and on behalf of her minor children, Jerrell White and Terrell Roth, Courtney Little, on her own behalf and on behalf of her minor children, Tezanne Allen, Rashad Little, and Fabian Earls, Jr., Reynell Santee, and his spouse, Tawana Rayford, on their own behalfs and on behalf of their minor children, Ranisha Rayford, Wynell Rayford, and Reynell Rayford, Darron Meyers, Troylyn Meyers, on her own behalf and on behalf of her minor children, Keiera Minor and Ashley Meyers, and on behalf of her grandchild, Daniah Williams, Roxchell Santee, on her own behalf and on behalf of her minor child, Tyree Santee, Phillip Lazard, Marguerite Lazard, Joel Frank, Juliet Johnson, Ronald Rome, Aunna Johnson, on her own behalf and on behalf of her minor children, Darryl Johnson and Carlos Johnson, John Washington, Bernadine Washington, Wanda Washington, Alexis Washington, Hazel Taylor,

Christina Taylor, Sophia Taylor, on her own behalf and on behalf of her minor child, Alex Taylor, Yolanda Washington, on her own behalf and on behalf of her minor children, Alecia Washington, Alacia Washington and Tyrell Washington, Tyronne Washington, Bruce Washington, Larry Rowe, Dianne Santee, Toni Santee, on her own behalf and on behalf of her minor children, Paris Johnson, Traychell White and Kani Santee, Reynell Santee and his spouse, Tawana Rayford, on their own behalf and on behalf of their minor children, Ranisha Rayford, Wynell Rayford and Reynell Rayford, Kelly Simon, Robert Santee, Diana Santee, on her own behalf and on behalf of her minor children, Timothy Santee, Marvin Santee, Ireal Santee, Tiffany Santee, Teianna Santee, Teriane Santee and Niecal Santee, Wilson Ricks, Brent Smith, Jr., on his own behalf and on behalf of his minor child, Brent Smith III, Michael Gaines, Kim Gaines, on her own behalf and on behalf of her minor children, Jamechia Smith and Diamond Beam, Victor Moore and his spouse, Pamelyn Morgan, on their own behalf and on behalf of their minor children, Victor Lyn Morgan, Pamelor Morgan, Vicknesha Morgan and Victoria Moore, Louise Ragas, Fayann Ragas, Terrill Morris, Linda Morris, Vanesa Davis, James Cook, Daniel Davis, Jeanette Williams, Reverend Curtis Coleman, Sr., on his own behalf and on behalf of his entire Congregation and the Ephesian Missionary Baptist Church, Mary P. Mingo, Rachel Goldsmith, Gayle LeBlanc, Michael LeBlanc, and his spouse, Larice Taylor LeBlanc, on their own behalf and on behalf of their minor child, Mika Jane LeBlanc, Jessie Arbuthnot, Curtis Coleman, Sr., Curtis Coleman, Jr., Jerome Coleman, Keith Coleman, Carnese Williams, Raymond Hunter, William Hunter, AndrewWilliams, Eric Williams, Winston Williams,

Paul Mosley, Sr., Paul Mosley, Jr., Brandon Mosley, Hope Mosely, Shaqual Mosley, Shannel Mosely, Ivan Mosley, Betty Mosley, Margarite Rochon, Raymond Hunter, Naomi Hunter, Wilson M. Simmons, Procula D. Simmons, Tammy Amos, Michael Green, Ronald M. Farve, on his own behalf and on behalf of his minor daughter, Rhonda Farve, Renee' Farve, on her own behalf and on behalf of her minor children, Jalicia Slick, Darvell Burgess and Dwight Clark, Silas Battie, Wrenel Hill, Janice Hill, Shinedel Hill, Janet Ausbrook, on her own behalf and on behalf of her mother, Anna Ausbrook, and her brother, James Ausbrook, Trenese Simon, on her own behalf and on behalf of her minor daughter, Lashal Simon, Jocelyn Causey, Shelita Simon, on her own behalf and on behalf of her minor children, Roger Simon, Rogerrikka Simon, Terrell Simon, Terrell Byrd and Tyrell Byrd Coleen Mooney, Paul Mosely, Judith Chauppette, Tarita B. Smith, on her own behalf and on behalf of her minor children, Byron Smith and Royce Smith, Trey McCrory, Ether Bullock, on her own behalf and on behalf of her minor grandson, Tharnell Bullock, Charles Terrell, Evelyn McDowell, on her own behalf and on behalf of her deceased mother, Sylvia Haley, and as personal representative of the deceased, and on behalf of her minor son, Gino McDowell, her minor grandson, Bishop Thomas, minor nephew, Lewis Johnson, and minor niece, Jaleesa Robinson.

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JURISDICTION

The District Court Order and Reasons, and Judgment appealed from, were simultaneously issued on July 19, 2006. A timely Notice of Appeal followed. The decision of the Court of Appeals was issued on May 9, 2008. This Petition is filed within 90 days thereafter. This Court has jurisdiction pursuant to 28 U.S.C. 28 U.S.C. §1254(a).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section I

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment XI

> The judicial power of the United States shall not be construed to extend to any suit in law or

equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

28 U.S.C. §144

Whenever a party to any proceeding in a district court makes and files a sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

28 U.S.C. §455(a) and (b)

(a) Any justice, judge or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
(b) He shall also disqualify himself in the following circumstances:
(1) Where he has a personal bias or prejudice concerning a party . . .

28 U.S.C. §1346(b)(1), Federal Tort Claims Act

. . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the

United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §1367, Supplemental Jurisdiction

Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

28 U.S.C. §1653, Amendment of Pleadings to Show Jurisdiction

Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

Rule 15(a) Federal Rules of Civil Procedure

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar, the party may so amend it at any time within 20 days after it is served.

Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

28 U.S.C. §2675(a), Federal Tort Claims Act

An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

42 U.S.C. §1983, Civil Rights Act

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory or the District of Columbia, subject, or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to other deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be libel to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

46 U.S.C. §740, Admiralty Extension Act

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: *Provided*, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act [46 App. U.S.C. 781 et. seq.] or Suits in Admiralty Act [46 App. U.S.C. 741 et seq.], as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hithered to filed under the Federal Tort Claims Act: *Provided further*, That no suit shall be filed against the United States until there shall have expired a period of six months after the claims has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage.

46 U.S.C. §742, Suits in Admiralty Act

In cases where if such vessel were privately owed or operated, or if such cargo were privately owned or possessed, or if a private person or

> property were involved, a proceeding in admiralty could be maintained, any appropriate non-jury proceeding in personam may be brought against the United States or against such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found.

STATEMENT

This is essentially a tort case (although also involving constitutional torts under 42 U.S.C. §1983) brought by totally innocent "Victims of KATRINA" as a result of what has been called "the greatest civil engineering disaster in history". Petitioner has alleged to be a representative of the following classes of people:

A. Survivors of human beings who died as a result of government's intentional and negligent malfeasance, misfeasance and non-feasance prior to and after Hurricane KATRINA.

B. Citizens and/or residents of the Parish of Orleans,[1] State of Louisiana, who suffered bodily injury, mental suffering and emotional distress as a result of government's intentional and negligent malfeasance, misfeasance and non-feasance prior to and after Hurricane KATRINA.

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[1] Petitioner's original Complaint was later amended to include residents of the Greater New Orleans Metropolitan Area, including the Parishes of Jefferson and St. Bernard.

C. Citizens and/or residents of the Parish of Orleans, State of Louisiana, who suffered loss of or damage to property as a result of government's intentional and negligent malfeasance, misfeasance and non-feasance, whether by flood, fire or governmental sanctioning of urban terrorism. See *infra*.

D. Citizens and/or residents of the Parish of Orleans, State of Louisiana, who suffered environmental damages akin to contamination of natural resources under the federal and state legislation which make provision for Natural Resource Damage Assessments and damages recoverable under the Oil Pollution Act of 1990, the Louisiana Oil Spill Prevention and Recovery Act, and CERCLA, among others.

Petitioner's claims for damages included claims for the following:

Wrongful death;
Bodily injury;
Property loss and/or damage;
Emotional distress and mental anguish;
Economic losses; and
Pollution

all incurred by virtue of the retaining wall and levee failures, and government's incompetence, malfeasance and negligence in preparing for and responding to the manmade disaster called Hurricane KATRINA.

Predictably, and consistent with the defense posture of all bodies, entities and individuals joined as defendants in "Victims of KATRINA" litigation, namely that "no one is legally responsible to anyone for

anything", all defendants responded to Petitioner's claims by filing Rule 12(b) motions to dismiss on the pleadings, with the United States of America challenging the Court's jurisdiction for failure to exhaust administrative remedies arguably required under the Federal Tort Claims Act, and with the State defendants invoking immunity from being required to litigate in Federal Court by virtue of the 11th Amendment to the U.S. Constitution, and claiming "qualified immunity" as a defense to the claims asserted under 42 U.S.C. §1983. All non-Federal defendants also challenged the jurisdiction of the Federal Court to exercise supplemental jurisdiction over the claims against them pursuant to 28 U.S.C. §1367.

On July 19, 2006, with briefing on Rule 12 Motions to Dismiss complete, but without entertaining oral argument, the District Court entered its Order and Reasons (Record Document No. 788), essentially dismissing all of plaintiffs' claims against virtually every named defendant, simultaneously entering Judgment pursuant to the provisions of Rule 54(b).

Petitioner filed a timely Notice of Appeal on July 19, 2006.

On May 9, 2008, without entertaining oral argument, the United States Court of Appeals for the Fifth Circuit rendered its decision affirming the District Court, saying:

> a) Petitioner's appeal of the dismissal of her claims against the United States was interlocutory,[2] and would be dismissed.

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[2] Clearly in error, since the District Court Judgment was entered pursuant to Rule 54(b).

b) Petitioner's constitutional claims against State and Local governmental entities were dismissed "for lack of subject matter jurisdiction and for failure to state an adequate claim for civil rights violations".

c) "The district court properly dismissed these claims and refused to exercise supplemental jurisdiction over the state law claims".

The issues for which petitioner seeks review in this Court fall into the following categories:

1. Petitioner's claims against the United States of America;
2. Petitioner's constitutional-based claims against non-Federal defendants; and
3. Petitioner's tort-based claims against non-Federal defendants.

REASONS FOR GRANTING THE PETITION

There are a number of reasons for granting the Petition, each (addressed infra), involving departures from the accepted and usual course of judicial proceedings in District Courts and in Courts of Appeal, as to call for an exercise of this Court's supervisory power:

a) The integrity of the underlying litigation is at issue.

The first question presented for review was framed in the District Court as follows:

> "The integrity of this litigation which has been called into question by virtue of an extra-judicial source of bias and prejudice, arising out of the Court's long-time friendship with Mr. Fayard, whose professional ethics and professional integrity have been placed at issue in this litigation as a result of his Membership on Committees while simultaneously representing the interests of the State of Louisiana, and failing to disclose his relationship with the State to the Court or to other counsel prior to August 29, 2007." Record Document No. 11317 and related Record Documents.

Amplification on this most serious issue can be found in Record Document No. 10910 and in the pleadings filed in Civil Action No. 08-1127 in the United States District Court for the Eastern District of Louisiana, and in the Record Documents specifically identified in that civil action.

With "the protection of the integrity and dignity of the judicial process from any hint or appearance of bias" being "the palladium of our judicial system", Petitioner respectfully submit that that protection requires the exercise of this Court's supervisory power in this case. "The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact." Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) and cases cited therein.

b) The Doctrine of Futility has rendered "moot" any administrative claim requirement as a prerequisite to filing suit against the Federal Government.

Petitioner respectfully submit that the Court should be guided in addressing the second, third and fifth "questions presented" by the contents of two (2) Law Review Articles:

1) Federal Tort Claims Act: Notice of Claim Requirement, 67 Minnesota Law Review 513 (1982); and
2) Zillman, Presenting a Claim Under the Federal Tort Claims Act, 43 Louisiana Law Review 961 (1983).

The axioms developed in the cited Law Review Articles are summarized as:

1) The FTCA was intended to provide for "more fair and equitable treatment of private individuals and claimants when they deal with the Government."[3]
2) The statute was "intended to provide a framework conducive to the administrative settlement of claims, not to provide a basis for a regulatory checklist which, when not fully observed, permits the termination of claims regardless of their merits."[4]
3) "The purpose of the [mandatory administrative claims procedure] was not

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[3] Erxleben v. United States, 668 F.2d 268 (7th Cir. 1981).
[4] Ibid.

to make recovery from the Government technically more difficult."[5]

4) "An individual with a claim against the United States, therefore, satisfies section 2675's requirement that `the claimant shall have first presented the claim to the appropriate Federal agency' if the claimant (1) gives the agency written notice of his or her claim sufficient to enable the agency to investigate and (2) places a value on his or her claims."[6]

5) An agency's demand for anything more than a written and signed statement setting out the manner in which the injury was received, enough details to enable the agency to begin its own investigation and a claim for money damages is unwarranted and unauthorized.[7]

6) Section 2675(a) was not intended to allow an agency to insist on proof of a claim to its satisfaction before the claimant becomes entitled to a day in court. To so hold would permit federal defendants to be judge in their own cause by the initial determination of a claim's insufficiency. The result would not be consistent with the congressional purpose of "providing for more fair and equitable treatment of

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[5] Adams v. United States, 615 F.2d 284 (5th Cir. 1980), quoting from Executive Jet Aviation, Inc. v. United States, 507 F.2d 508, 515 (6th cir. 1974).

[6] Ibid.

[7] Ibid.

private individuals and claimants when they deal with the Government."[8]

7) Agencies were not intended to bar cases involving difficult issues from federal court by turning their difficulty against the claimants.[9]

8) Federal court power does not depend on whether a claimant has successfully navigated his or way through the gauntlet of the administrative settlement process, which, according to the vagaries of the claims agent, may touch picayune details, imponderable matters, or both.[10]

9) The Fifth Circuit has not required plaintiffs to specifically enumerate legal theories of recovery in their administrative claims.[11]

10) The exaltation into a jurisdictional basis of the non-statutory administrative requirement of a sum certain in the administrative claim has been criticized as beyond the statutory intent and unnecessarily harsh and unnecessary in instances, especially where no administrative purpose is served by requiring an obviously inflated "sum certain" where there is honest

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[8] Avery v. United States, 680 F.2d 608 (9th Cir. 1982) and authorities cited therein.

[9] Ibid.

[10] Ibid.

[11] Youngblood v. Federal Deposit Insurance Corporation, 29 F.3d 225 (5th Cr. 1994).

uncertainty as to the amount of the claim.[12]

With these axioms in mind, Petitioner respectfully direct the attention of the Court to the following facts:

1) The "official" litigation position of the United States of America in "Victims of KATRINA" litigation is that the Federal Government is absolutely immune from any and all liability and damages by virtue of Section 702(c) of the Flood Control Act of 1928. Alternatively, the "official" position of the Federal Government is that the "due care" and "discretionary function" exceptions to the waiver of sovereign immunity contained in the Federal Tort Claims Act immunizes the Government from liability and damages.

2) Notwithstanding the fact that almost 3 years have elapsed since Hurricane KATRINA, and notwithstanding the submission of over 350,000 administrative claims for sums certain, in writing, to the U.S. Army Corps of Engineers and to the Federal Emergency Management Agency, not one case has been settled or compromised by the Federal Government, and not one penny has been paid to claimants.

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[12] Martinez v. United States, 728 F.2d 694 (5th Cir. 1984) and authorities cited therein.

3) One of the reasons for the fact that not one case has been settled or compromised is the fact that no agency or instrumentality of the Federal Government is equipped to deal with the sheer volume of claims which have been asserted.

Petitioner respectfully submit that when a federal agency has done absolutely nothing in a 3-year period to competently process, adjust and settle not even one claim in over 350,000 calls for the exercise of supervisory power by this Court to except Petitioner from any administrative claim procedures by virtue of the Doctrine of Futility.

c) The failure to grant leave for Petitioner to amend her pleadings violated the clear provision of Rule 15(a) and constituted an abuse of discretion.

The fourth question presented involves the failure to grant leave for Petitioner to amend her Complaint in order to invoke admiralty and maritime jurisdiction, and the application of substantive maritime law, so that the Suits in Admiralty Act would be applicable to this case. The Suits in Admiralty Act contains no administrative claim requirement. Petitioner avers that the failure to permit amendment of the Complaint violated the clear provisions of Rule 15(a) and jurisprudence from this Court interpreting Rule 15(a).

The Petitioner was trying to accomplish by way of her 12th Amended Complaint was to expand her

jurisdictional allegations to include the allegation that admiralty and maritime jurisdiction existed in the hope that, eventually, they would be given the opportunity to attempt to persuade the Learned District Judge that the Suits in Admiralty Act was applicable to Petitioner's claims against the United States of America, so that the administrative claims procedures of the Federal Tort Claims Act (28 U.S.C. §2671, et seq.), and the Admiralty Extension Act (46 U.S.C. §740), were not required as a prerequisite to Petitioner suing the Government.

> **Rule 15. Amended and Supplemental Pleadings.**
>
> a. **Amendments.** A party may amend the party's pleading once as a matter of course at any time before responsive pleading is served . . . Otherwise a party may amend the party's pleading only by leave of Court or by written consent of the adverse party; and leave shall be freely given when justice so requires. (emphasis added).

The District Court and the Court of Appeals also failed to apply the provisions of 28 U.S.C. §1653 to Petitioner's benefit. That statute provides as follows:

> **§1653. Amendment of pleadings to show jurisdiction.**
>
> Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

In Foman v. Davis, 371 U.S. 178 (1962), this Court enunciated the following general standard, which is to be employed under Rule 15 (a) by District Courts:

> If the underlying facts or circumstances relied upon by a plaintiffs may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be "freely given". 371 U.S. @ 182.

Both the case law and the Learned Commentators make clear that "prejudice" to the opposing party, not the mover's lack of diligence, is the crucial factor in determining whether or not to grant leave to amend a complaint. Wright, Miller & Kane, Federal Practice and Procedure: Civil Second §1487, p. 613, et seq., and cases cited therein. In the case at bar, no one ever claimed, much less proved, how Petitioner's Motion for Leave to Supplement and Amend would cause any defendant prejudice.

The Learned Commentators report many circumstances much more egregious than in the case at bar where amendments have been allowed:

> Quite appropriately, the Courts have not imposed any arbitrary timing restrictions on a party's request for leave to amend and

> permission has been granted under Rule 15(a) at various stages of the litigation: following discovery; after a pre-trial conference; at a hearing on a motion to dismiss or for summary judgment; after a motion to dismiss has been granted but before the order of dismissal has been entered; when the cases on the trial calendar and has been set for a hearing by the district court; at the beginning, during, and at the close of trial; after a judgment has been entered; and even on remand following appeal." Wright, Miller & Kane, §1488, p. 652, et seq., and cases cited therein.

It is respectfully submitted that the facts and circumstances of this case do not even come "close" to duplicating the foregoing "egregious" circumstances in which amendments were allowed.

The law as enunciated in the Fifth Circuit is as follows: Fed.R.Civ.P. 15(a) permits amendment of a pleading after a responsive pleading has been served with leave of court. However, the court should freely give leave to amend "when justice so requires." It is often said that this determination rests in the sound discretion of the district court. *See, e.g., Chitimacha, Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1163 (5th Cir. 1982), *cert. denied*, (1983). However, the Rule "evinces a bias in favor of granting leave." *Id.* (quoting *Dussouy v. Gulf Coast Investment Corp.*, 660 F.2d 594, 597 (5th Cir. 1981)). The policy of the federal rules is to permit liberal pleading and amendment, thus facilitating adjudication on the merits while avoiding an excessive formalism. *Dussouy*, 660 F.2d at 598, (citing *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230 9 L.Ed. 2d 48, 78 S.Ct. 99, 103, 2 L.Ed. 2d 80 (1957)).

Thus, if the district court lacks a "substantial reason" to deny leave, its discretion "is not broad enough to permit denial." *Id.* Jamieson by and through Jamieson v. Shaw, 772 F.2d 1205, 1208 (Fifth Cir. 1985).

It is respectfully submitted that, at the very early stage of the litigation when Petitioner sought leave to amend, there was no "substantial reason" why either the District Court or the Court of Appeals should have denied leave to amend. Petitioner further submits that this error can be remedied in this Court pursuant to 28 U.S.C. §1653, which allows Petitioner to cure "defective allegations of jurisdiction" even in an appellate court. No party will suffer "prejudice" by virtue of the proposed amendment. Rather, it was Petitioner's case which was prejudiced by denial of leave to amend.

d) Petitioner adequately stated a cause of action under 42 U.S.C. §1983.

In the celebrated case of *Gomez v. Toledo*, 446 U.S. 635 (1980), Justice Marshall, writing for a unanimous Supreme Court, announced:

> "By the plain terms of §1983, two – and only two –allegations are required to state a cause of action under the statute. First, the plaintiff must allege that some person has deprived him of a "federal right". Second, he must allege that the person who has deprived him of that right acted under color of State or territorial law."

Petitioner respectfully submit that her constitutional based allegations against the Governor,

individually, and against the municipal defendants, both officially and individually, satisfied the requirements set forth by Justice Marshall in *Gomez v. Toledo*.

The original handwritten Complaint filed on behalf of Petitioner on September 19, 2005, specifically alleged the following facts:

> **EVIDENCE OF GOVERNOR BLANCO'S AND MAYOR NAGIN'S INCOMPETENCE AND VIOLATION, BY MALFEASANCE AND MISFEASANCE, NEGLIGENCE, GROSS NEGLIGENCE AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.**
>
> 1) The real story is not that the City of New Orleans was ransacked and its citizens raped and murdered by illegally armed urban terrorists, commencing even before Hurricane KATRINA had moved North of the City, but the fact that the urban terrorists had been allowed to live amongst hard-working, law-abiding, taxpayers and citizens at all before the storm. If Mayor Nagin and his appointed Chief of Police had been doing their jobs these urban terrorists would have been disarmed, arrested, tried, convicted and incarcerated long before the approach or Hurricane KATRINA to the City of New Orleans.
>
> * * *
>
> 5) A competent Governor of a State within the United States, with full knowledge of the total breakdown of law and order in the City of New Orleans, even before

Hurricane KATRINA had moved out of the City, should have immediately invoked martial law or invited the United States Military Forces to do so. Upon information and belief, Governor Blanco did not do so, because to have done so would have required that both she and Mayor Nagin would have had to (sic) relinquish all power to the United States Army Provost Marshall – in other words the Governor made a political decision rather than one motivated by government's primary obligation to its citizenry, *i.e.*, the protection of the citizenry's lives, property and quality of life.

6) Mayor Nagin, in a now-celebrated radio interview with local news celebrity Garland Robinette, demonstrated his utter ignorance of the term "martial law", which he was powerless to invoke. Further, Mayor Nagin utterly failed in his duties to his citizenry by failing to order Chief of Police Compass to invoke *posse comitatus*, and to deputize law-abiding citizens to do whatever was necessary to keep the peace, pursue and arrest and/or kill felons, and to restore order to the City, which was, in effect, turned over to illegally armed gangs of urban terrorists for more than one (1) week after the storm. By the failure of Governor Blanco to declare martial law, and by the failure of Mayor Nagin to order his Chief of Police to invoke *posse comitatus*,

> Governor Blanco and Mayor Nagin in effect "organized" State and local "government sponsored urban terrorism" on the City and its law-abiding citizens. For this they should pay a heavy price. (emphasis in original).
>
> * * *
>
> Plaintiffs reaver and reiterate that the above and foregoing examples of the total incompetence, etc. of certain defendants is a non-exclusive list, and plaintiffs specifically reserve the right to enumerate other examples of incompetence, etc. once the facts become better known.

Petitioner expanded her allegations of constitutional deprivations commencing on page 37 of the original Complaint with the following:

> XI.
>
> COUNT 5
>
> Plaintiffs reaver and reiterate their allegations as aforesaid, and in addition aver that certain defendants intentionally, negligently and with malfeasance, misfeasance and non-feasance failed to protect the public from marauding bands of convicted felons, and persons who were "already in the criminal justice system", illegally armed and terrorizing law-abiding citizens, including killing them and destroying property.
>
> XII.
>
> COUNT 6
>
> Plaintiffs reaver and reiterate their allegations as aforesaid, and in addition aver that

> certain defendants intentionally, negligently, and with malfeasance, misfeasance and non-feasance failed to safeguard the identification records and criminal records of convicted sex offenders, including rapists and pedophiles, and "injected" these individuals into the refugees at the Louisiana Superdome and Convention Center, which refugees included large numbers of young women and children, with entirely predictable results."

Commentators have noted that "In evaluating the sufficiency of a complaint in a civil rights action, the crucial questions are whether sufficient facts are pleaded to determine that the complaint is not frivolous and to provide the defendants with adequate notice to frame an answer." *Federal Procedure*, Lawyers Edition §11:256 (1989). Petitioner respectfully submits that the above-quoted allegations from the original Complaint satisfy any jurisprudential "requirement" that a §1983 plaintiff must allege with "a certain level of specificity" the particular facts of a defendant's conduct in the complaint, and that the facts they have pleaded go far beyond mere "conclusory' allegations. Petitioner also respectfully submit that her allegations were more than sufficient to state causes of action pursuant to 42 U.S.C. §1983, for as the Commentators have also noted:

> ". . . a court cannot expect a complaint to provide proof of the plaintiffs' claims, nor a proffer of all available evidence. In civil rights cases, especially class actions, much of the evidence can be developed only through discovery, and while plaintiffs may be expected to know the injuries they allegedly have suffered, it is not reasonable

> to expect them to be familiar at the complaint stage with the full range of the defendants' practices under challenge. So although a civil rights complaint which relies on vague conclusory allegations does not provide fair notice and will not survive a motion to dismiss, where sufficient facts are alleged in the complaint, so that the court is satisfied that the complaint is not frivolous and that the defendants have been provided with adequate notice so that they can answer the complaint, then the complaint will be deemed sufficient and will be sustained." *Federal Practice*, Lawyers Edition §11:256 (1989).

Petitioner respectfully submit that her Complaint is such a complaint.

In terms of the so-called defense of "qualified immunity", Federal Procedure, Lawyers Edition (1989) provides guidance. Section 11:281 of that Treatise reflects:

> Once the plaintiff has made out a prima facie case, the burden of going forward with the evidence shifts to the defendant. For example, the burden is on the defendant to establish a qualified immunity defense by showing that its conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known, that is, that the defendant was acting within the scope of its discretionary authority when the allegedly wrongful acts occurred. Once the defendant establishes the existence of such "objective" good faith, the burden shifts to the plaintiff to

show a lack of good faith. Federal Procedure, Lawyers Edition (1989) §11:281 and authorities cited therein.

Petitioner respectfully submit that it was wrong for the Court of Appeals to say that "Plaintiffs have not made a sufficiently clear allegations that the defendant governmental entities and officials violated the Plaintiffs' constitutional rights", and that this Court should exercise its supervisory power to set the District Court and the Court of Appeals "right".

e) The State has waived 11th Amendment immunity by virtue of its litigating conduct.

The seventh question presented is:

7) Whether the State of Louisiana, its branches of government, agencies and instrumentalities, political subdivisions and individual department heads have waived immunity from being required to litigate claims brought against them in Federal Court pursuant to the 11th Amendment to the U.S. Constitution, including particularly, but without limitation, waiver "by litigating conduct" in the Federal forum by voluntarily invoking the jurisdiction of the United States District Court for the Eastern District of Louisiana on multiple occasions since August 29, 2005.

This Court is respectfully directed to the following completely voluntary invocations of Federal jurisdiction by the State of Louisiana since Hurricane KATRINA:

Civil Action No. 05-4182

Record Document No. 1061

Civil Action No. 06-8676

Record Document Nos. 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 41, 100, 101. 102, 112, 124, 135, 142, 151, 177 and 180

Civil Action No. 07-5023

Record Document No. 1

Civil Action No. 07-5036

Record Document No. 1

Civil Action No. 07-5040

Record Document No. 1

Civil Action No. 07-5226

Record Document No. 1

Petitioner particularly refer this Court to the claims asserted by the State of Louisiana against the United States of America in Civil Action No. 07-5040, which was filed in the United States District Court for

the Eastern District of Louisiana on August 29, 2007, in order to assert an affirmative claim on behalf of the State against the Federal Government in the amount of $200 billion dollars in property damages allegedly sustained by the State in connection with the levee and retaining wall failures during Hurricane KATRINA.

Petitioner respectfully submit that if waiver by litigating conduct and voluntary invocation of the jurisdiction of the Federal Court system has not occurred with respect to the State of Louisiana in this case, then the Doctrine of Waiver no longer means anything in American jurisprudence.

Petitioner further respectfully refer this Court to the following legal authorities:

Clark v. Barnard, 108 U.S. 436, 2 S.Ct. 878 (1883)

Ford Motor Company v. Department of Treasury of Indiana, 323 U.S. 459 (1945)

College Savings Bank v. Florida Prepaid Post Secondary Education Expense Book, 527 U.S. 666 (1999)

Lapides v. Board of Regents of the University System of Georgia, 535 U.S. 613, 122 S.Ct. 1640 (2002)

Fernandez v. PNL Asset Management Company LLC, 123 F.3d 241 (5th Cir. 1997)

Gil Seinfeld, "Waiver-in-Litigation: Eleventh Amendment Immunity and the Voluntariness Question", 63 Ohio State Law Journal 871 (2002).

Nowak and Rotunda, "Treatise on Constitutional Law – Substance & Procedure", §2.12 (4th Ed.)

Petitioner respectfully submit that even the possibility of waiver of 11th Amendment immunity by a State by virtue of its litigating conduct is an issue which warrants the exercise of this Court's supervisory jurisdiction.

Alternatively, Petitioner respectfully submit that she should have been permitted to conduct discovery into whether the State of Louisiana may have waived 11th Amendment immunity from being required to litigate claims brought against it in Federal Court by virtue of its having accepted untold billions from the Federal Government both before and since Hurricanes KATRINA and RITA. Similarly, Petitioner respectfully submit that she should have been allowed to conduct discovery into whether agencies of the Federal Government, with Congressional authority, may have abrogated the State's 11th Amendment immunity by bestowing untold billions on the State.

f) Even if 11th Amendment immunity was not waived by the State, failure to exercise supplemental jurisdiction over tort claims against the State constituted an abuse of discretion.

With respect to the 8th and 10th questions presented, Petitioner respectfully submit that, if the State has waived 11th Amendment immunity by virtue of its litigating conduct, then Petitioner's tort claims against the State, et al., were properly brought in Federal Court. In the alternative, however, Petitioner avers that the District Court's the failure to exercise

supplemental jurisdiction over Petitioner's tort claims against the State constituted an abuse of discretion.

g) Petitioner's causes of action for pollution damages and damages in the nature of off-set or set-off should not have been dismissed.

What happened to the City of New Orleans and Greater Metropolitan Area, in terms of damage to the environment, rivals the M/T EXXON VALDEZ casualty. However, in many ways, the environmental disaster visited on Louisiana is much more serious, because a much greater land area was affected than in Prince William Sound. Also, the M/T EXXON VALEZ case did not result in death or personal injury to human beings. Nor did it result in the destruction and damage to homes and businesses of thousands, perhaps hundreds of thousands, of people. The water which inundated the City, in some places for months, served as a medium for the transport of oil and other petroleum products, human and animal waste, decaying bodies, toxic chemicals and other hazardous materials to migrate from their points of origin. Whatever was in several Superfund sites within the City limits also became "waterborne", allowing the contents of those sites to contaminate other parts of the City remote from the original sites.

Count 9 of Petitioner's Complaint alleged that defendant the Governor, individually, the defendant City and defendant Nagin "negligently, intentionally, and with malfeasance, misfeasance and non-feasance caused pollution of the environment of the territory and atmosphere of the Parish of Orleans, State of Louisiana, which not only caused damage to plaintiffs and other

persons, firms and corporations similarly situated to plaintiffs, but which pollution must be contained, cleaned up, remediated and disposed of – a Herculean and expensive task." Complaint, Article XV(9), pp. 43-44. It is respectfully submitted that Petitioner's claim for damages for pollution should not have been dismissed on a summary basis.

Additionally, in their Eleventh Supplemental and Amending Complaint filed with leave of Court, Petitioner specifically pleaded "set-off" against the United States of America, claiming recoupment of amounts which Petitioner have paid, owe, or might in the future owe, the United States in taxes. More particularly, Petitioner alleged, by way of the Eleventh Amendment to their Complaint, the following against the United States, which claims were perfected with leave of Court:

> XIXXII.
>
> In the alternative, Plaintiffs plead "compensation" (as that term is used in Louisiana Civil Code Article 1893, et seq.) and the "right of recoupment", as well as "offset" and "set-off", against the United States of America, through its agencies and instrumentalities, the Department of the Treasury, the Internal Revenue Service and the Social Security Administration.

28 U.S.C. §1346(c) specifically provides that "[t]he jurisdiction conferred by this section includes jurisdiction of any set-off . . . or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section". Petitioner read that provision as conferring jurisdiction

over her claims for "compensation", the "right of recoupment", "offset" and "set-off" against the United States for sums already paid, or to be paid, in Federal taxes, and respectfully submit that proper judicial interpretation of the cited federal statute warrants the exercise of this Court's supervisory power.

CONCLUSION

For the above and foregoing reasons, Petitioners respectfully request the issuance of a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,
Maureen O'Dwyer
Pro se
5939 Vicksburg Street,
New Orleans, LA 70124;
(504) 484-1053

(any footnotes trail end of each document)

No. 06-30840

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MAUREEN O'DWYER; HAROLD JOSEPH GAGNET; SALLY EGERTON RICHARDS; STEPHANIE PORTER, doing business as Interior Specialties LLC; SHEILA JORDAN JORDAN; ET AL, Plaintiffs - Appellants

v.

UNITED STATES OF AMERICA, through its agencies & instrumentalities the United States Army Corps of Engineers and the Federal Emergency Management Agency (a/k/a FEMA); KATHLEEN BLANCO, Louisiana State Governor, both individually & in her elected capacity; LOUISIANA STATE; RAY NAGIN, Mayor, both individually & in his elected capacity; NEW ORLEANS CITY; EDDIE COMPASS, Chief of police, both individually & in his appointed capacity; EDDIE JORDAN, District Attorney, both individually & in his appointed capacity; JIM HUEY, President of Orleans Parish Levee Board, both individually & in his official capacity; ORLEANS PARISH LEVEE BOARD; RAY NAGIN, Orleans Parish Sewerage & Water Board, both individually & in his capacity; CRIMINAL SHERIFF FOR THE PARISH OF ORLEANS; CLERK OF COURT, PARISH OF ORLEANS, CRIMINAL DISTRICT; UNIDENTIFIED PARTIES; ORLEANS PARISH SEWERAGE AND WATER BOARD; AARON BROUSSARD, individually & in his capacity as President for the Parish of Jefferson; JEFFERSON PARISH; KIMBERLY WILLIAMSON BUTLER,

Clerk of Court, Orleans Parish Criminal District Court; EUSTIS ENGINEERING COMPANY INC; MODJESKI & MASTERS INC; C RAY NAGIN, Honorable Mayor, sued as Ray Nagin; EDWIN COMPASS, III, former Superintendent of Police, sued as Eddie Compass; ORLEANS LEVEE DISTRICT, Board of Commissioners, sued as Orleans Parish Levee Board; ST PAUL FIRE & MARINE INSURANCE CO; LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT; SEWERAGE AND WATER BOARD OF NEW ORLEANS; B & K CONSTRUCTION COMPANY INC; BURK KLEINPETER, INC; CSX TRANSPORTATION INC; GEOTECH, INC; PITTMAN CONSTRUCTION CO, INC; WASHINGTON GROUP INTERNATIONAL INC, Defendants – Appellees

May 9, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Appeals from the United States District Court for the Eastern District of Louisiana. 2:05-CV-4182.

JUDGES: Before DAVIS and SOUTHWICK, Circuit Judges, and CLARK, District Judge. *

OPINION

PER CURIAM: **

Hurricane Katrina slammed against parts of the Louisiana and Mississippi Gulf coasts on August 29, 2005. New Orleans suffered serious flooding. Plaintiffs filed suit against numerous defendants, including the United States, the State of Louisiana, and local governmental and private entities. Plaintiffs sought payment for personal injury and property damage caused by the flooding in New Orleans. The essence of the claims is that the decisions made by governing officials in all levels of federal, state, and local government caused the Plaintiffs to be exposed to tragic conditions such as deprivation of food and water following the storm.

As this litigation developed, a magistrate judge allowed the Plaintiffs to file numerous amended complaints but after the eleventh amended complaint, warned that would be the last unless good cause was shown. Subsequently, Plaintiffs were not allowed to file a twelfth amended complaint to assert claims in admiralty. After the latest amendment was rejected, those same allegations became the basis of a separate lawsuit filed by the Plaintiffs. Claims against governmental entities were then dismissed. Some of the governmental party defendants were severed and are not involved in this appeal. *See Arcement v. Broussard*, 225 F. App'x 303 (5th Cir. 2007) (affirming the dismissal of claims against Aaron Broussard and Jefferson Parish for lack of jurisdiction).

The tort claims against the United States were dismissed for lack of jurisdiction because Plaintiffs failed to exhaust administrative remedies. Exhaustion is required before bringing a Federal Tort Claims Act suit. *Gregory v. Mitchell*, 634 F.2d 199, 203-204 (5th Cir.

1981). Proceedings against various private entities continue in district court. The appeal from the dismissal of the United States is therefore interlocutory. The Plaintiffs argue that a statute applies that allows appeals from interlocutory decrees that resolve the rights and liabilities of parties in admiralty cases. 28 U.S.C. § 1292 (a)(3). The appeal here is from the dismissal of the right to file a twelfth amended complaint to add an admiralty claim. The denial of a motion seeking leave to file this amended complaint does not resolve rights and liabilities. Indeed, the claims are now part of a separate lawsuit. The interlocutory appeal from the denial of the twelfth amended complaint and the dismissal of the United States is dismissed.

The constitutional claims against the state and local governmental entities and their officials were dismissed for lack of subject matter jurisdiction and for failure to state an adequate claim for civil rights violations. The district court declined to exercise supplemental jurisdiction over the remaining state law claims and entered a Rule 54(b) judgment. Plaintiffs have not made a sufficiently clear allegation that the defendant governmental entities and officials violated the Plaintiffs' constitutional rights. *See Freeman v. Gore*, 483 F.3d 404, 410 (5th Cir. 2007). The district court properly dismissed these claims and refused to exercise supplemental jurisdiction over the state law claims.

We DISMISS the interlocutory appeal and AFFIRM the dismissal of the claims against the state and local governments and their officials.

Footnotes

*District Judge of the Eastern District of Texas, sitting by designation.

**Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

CIVIL ACTION NO. 05-4182
SECTION "K"(2) CONS. KATRINA CANAL
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

COLLEEN BERTHELOT, ET AL.,

VERSUS

BOH BROTHERS CONSTRUCTION CO., L.L.C.,
ET AL.

PERTAINS TO: O'Dwyer 05-4181

ORDER AND REASONS

Before the Court are the following motions that were filed in O'Dwyer, et al. v. The United States of America, et al., C.A. OS-4181:

Doc. 104 Motion to Dismiss for Want of Standing or, Alternatively Pursuant to FRCP 12(b)(1), FRCP 12(b)(6) and FRCP 11(b)(2) with Incorporated Memorandum in Support Thereof filed by the City of New Orleans, the Honorable C. Ray Nagin, Mayor, and Former Superintendent of Police Edwin Compass, 111[1]

Doc. 105 Motion to Dismiss Pursuant to F.R.C.P. 12(b)(6) filed by Kimberly Williamson Butler, in her individual capacity.

Doc. 110 Amended Motion to Dismiss Pursuant to F.R.C.P. 12(b)(6) filed by Kimberly Williamson Butler, in her individual and official capacity

Doc. 106 Motion to Dismiss Defendant Governor Kathleen Blanco

Doc. 107 Motion to Dismiss Defendant State of Louisiana

Doc. 108 United States' Motion to Dismiss

Doc. 109 Motion to Dismiss on Behalf of Eddie Jordan, Individually and in his Elected Capacity as the District Attorney for the Parish of Orleans, State of Louisiana.

The Court has reviewed the pleadings, memoranda and the relevant law, and is prepared to address each motion herein seriatim.

BACKGROUND

The instant suit was filed on September 19, 2006, in the immediate aftermath of Hurricane Katrina. While it was initially filed "in proper person" by counsel[2], since its filing, counsel has amended the complaint eleven times, adding a multitude of individuals and alleging causes of action that include, inter alia, allegations of defalcations with respect to the adequacy and construction of the canals and flood walls that failed in the wake of Hurricane Katrina, the adequacy of the evacuation measures taken prior to Hurricane Katrina, and the adequacy and propriety of the response to the aftermath of Hurricane Katrina. In this one suit, plaintiffs have named as defendants the United States of America (including the Army Corps of Engineers ("the Corps") and the Federal Emergency Management Agency ("FEMA"), Kathleen Blanco, both individually

and in her official capacity as Governor of the State of Louisiana, the State of Louisiana, the City of New Orleans, Ray Nagin both individually and in his official capacity, Eddie Compass, both individually and in his official capacity as Chief of Police, Eddie Jordan, both individually and in his official capacity as District Attorney for the City of New Orleans, Jim Huey, individually and in his official capacity as President of the Orleans Parish, Orleans Parish Sewerage and Water Board, Kimberly Williamson Butler, individually and in her official capacity as Clerk of Court for the Orleans Parish Criminal District Court, Eustis Engineering Company, Inc., Modjeski and Master, Inc., the Board of Commissioners of the Orleans Levee District. [3] Pretermitting the propriety of the joinder of this number of plaintiffs, defendants and causes of actions, the Court will address the above-listed motions to dismiss.

THE COMPLAINT AND AMENDING COMPLAINTS

The Class Action Complaint begins with a listing of individual plaintiffs who are not specifically identified by address or any specific information, and provides for a number of "groupings" of which this amorphous listing of individuals claims to be representative. As for the jurisdictional basis, in Paragraph IV, plaintiffs initially allege, "This Court is the exclusive court of jurisdiction over the United States of America. This court has ancillary or pendant jurisdiction over the remaining defendants. "[4] (Doc. 1, Complaint, p. 17). The Complaint then proceeds with a general diatribe concerning the alleged defalcations of the defendants in this matter. (Doc. 1, Complaint, pp. 18-32). Plaintiffs continue by

alleging a number of "legal theories" against public officials including incompetence, violation of duty and statute, negligence, gross negligence, malfeasance, misfeasance, non-feasance, and intentional infliction of emotional distress. Plaintiffs in later amendments also contend that the "torts errors and omissions committed by [these] defendants satisfy the requirements for excepting from immunity from liability because of malicious, intentional, willful, outrageous, reckless or flagrant misconduct. La. Rev. Stat. 9:2798.1(C)(2)." In addition, plaintiffs contend that the defendants violated a criminal statute, La. Rev. Stat. 14:134 concerning malfeasance in office.[5]

The initial complaint contains "counts" which plaintiffs maintain contain the gravamen of the specific actions which are the basis for their complaint. In relevant part, these "counts" are as follows:[6]

Count 1 Plaintiffs reaver (sic) and reiterate all of their allegations as aforesaid, and in addition aver that certain of the defendants negligently, intentionally, and with malfeasance, misfeasance and non-feasance, failed to order the timely evacuation of critical care patients in hospitals, nursing homes, etc....

Count 2 that certain defendant intentionally, negligently [both gross and simple in nature], and with malfeasance, misfeasance and non-feasance failed in their duty to ensure competent design, construction, maintenance and inspection of the levee systems for the Industrial Canal, the London Avenue Canal and the Seventeenth Street Canal

Count 3 that certain defendants intentionally,

negligently and with malfeasance, misfeasance, and non-feasance failed to timely stop the flooding

Count 4 that certain defendants intentionally, negligently and with malfeasance, misfeasance, and non-feasance failed to secure the water supply to Orleans Parish causing increased fires.

Count 5 that certain defendants intentionally, negligently and with malfeasance, misfeasance, and non-feasance failed to protect the public from marauding bands of convicted felons and persons who were "already in the criminal justice system", illegally armed and terrorizing law-abiding citizens, including killing them and destroying property

Count 6 that certain defendants intentionally, negligently and with malfeasance, misfeasance, and non-feasance failed to safeguard the identification records and criminal records of convicted sex offenders, including rapists and pedophiles, and "injected" these individual into the refugees at the Louisiana Superdome and convention Center

Count 7 that certain defendants intentionally, negligently and with malfeasance, misfeasance, and non-feasance failed to safeguard the contents of the evidence room at Criminal District Court for to Parish of Orleans ...with the result that evidence was lost and/or compromised and successful prosecution thwarted.

Count 8 that certain defendants failed to safeguard the names of identifying prisoners who were in Orleans Parish prison.

Count 9 that certain defendants intentionally, negligently and with malfeasance, misfeasance, and non-feasance caused the pollution of the environment of the territory and atmosphere of the parish of Orleans.[7]

(Doc. l, Complaint, pp. 33-45.

In the Fourth Supplemental and Amending Complaint (Doc. 12), plaintiffs amended the allegations against the non-United States defendants from simply supplemental jurisdiction to state original federal subject matter jurisdiction "since plaintiffs were deprived of rights to life, property and the pursuit of happiness, guaranteed by the U.S. Constitution, and the law, statutes and treaties amendatory thereto, by state and/or governmental action, giving rise to purely federal causes of action."

In the Eleventh Supplemental and Amending Complaint in a Class Action Lawsuit (Doc. 78) plaintiffs amended Article IV (the jurisdictional allegations) of the Complaint as follows:

More particularly, this Court has jurisdiction of the claims herein asserted by virtue of the following, inter alia:

Original jurisdiction pursuant to the Second[8], Fifth[9] and Fourteen[10] (sic) Amendments to the United States Constitution

Original jurisdiction pursuant to 28 USC § 1331[11]

Original jurisdiction pursuant to 28 USC § 1346[12]

Original jurisdiction pursuant to 28 USC § 2571, et seq[13]

Original jurisdiction pursuant to Title XI of the Civil Rights Act[14]

Original jurisdiction pursuant to 42 USC § 1983[15]

Original jurisdiction pursuant to 42 USC § 1985[16]

Original jurisdiction pursuant to 42 USC § 1986[17]

Original jurisdiction pursuant to 42 USC § 1988[18]

Original jurisdiction pursuant to the Class Action Fairness Act, 28 USC § 1332, by virtue of the fact that the matter in controversy in this civil action exceeds the sum of $5 million, exclusive of interest and costs.

This Court also has jurisdiction of the claims herein asserted by virtue of the following environmental statutes, inter alia, which defendants violated, thus entitled Plaintiffs to damages from defendants:

The Oil Pollution Act of 1990 and precursor legislation
The Comprehensive Environmental Response Compensation and Liability Act and precursor legislation

The Federal Water Pollution Control Act The Clean Water Act

The Clean Air Act

The National Environmental Policy Act The Toxic Substances Control Act

The Resource Conservation and Recovery Act

The Louisiana Environmental Quality Act

The Louisiana Air Control Law

The Louisiana Water Control Law

The Louisiana Oil Spill Prevention and Response Act

Eleventh Supplemental and Amending Complaint (Doc. 128 at 4-5).

With this litany of alleged bases for jurisdiction, the Court will first address the propriety of this wholesale approach to jurisdiction and the actual basis upon which this Court recognizes that it entertains jurisdiction at this point in time under Fed. R. Civ. P 12(b)(1). The Court will then address each individual motion in the context of Fed. R. Civ. P. 12(b)(6) to the extent there is a jurisdictional basis for any claims against a specific defendant. The Court will now outline the legal parameters of that investigation.

STANDARD OF REVIEW

Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a party to challenge the subject matter jurisdiction of the district court to hear a case. The burden of proof for a Rule 12(b)(1) motion is on the party asserting jurisdiction. Ramming v. United States, 281 F.3d 158 (5TH Cir. 2001). As the Fifth Circuit has stated:

When a Rule 12(b)(1) motion is filed in conjunction with

other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits. Hitt v. City of Pasadena, 561 F.2d 606, 608 (5th Cir. 1977) (per curium). This requirement prevents a court without jurisdiction from prematurely dismissing a case with prejudice. Id. The court's dismissal of a plaintiff's case because the plaintiff lacks subject matter jurisdiction is not a determination of the merits and does not prevent the plaintiff from pursing a claim in a court that does have jurisdiction. Id.

When a defendant attacks the complaint because it fails to state a legally cognizable claim, Rule 12(b)(6) provides the appropriate challenge. The test for determining the sufficiency of a complaint under Rule 12(b)(6) is that "'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Id. citing Conley v. Gibson, 355 U.S. 41,45-46 (1957). The Fifth Circuit explained:

Subsumed within the rigorous standard of the Conley test is the requirement that the plaintiff's complaint be stated with enough clarity to enable a court or an opposing party to determine whether a claim is sufficiently alleged. Elliott v. Foufas, 867 F.2d 877, 880 (5th Cir. 1989). Further, "the plaintiff's complaint is to be construed in a light most favorable to plaintiff, and the allegations contained therein are to be taken as true." Oppenheimer v. Prudential Securities, Inc. 94 F.3d 189,194 (5th Cir.1996). This is consistent with the well-established policy that the plaintiff be given every opportunity to state a claim. Hitt, 561 F.2d at 608. In

other words, a motion to dismiss an action for failure to state a claim"admits the facts alleged in the complaint, but challenges plaintiff's rights to relief based upon those facts." TelPhonic Servs., Inc. v. TBS Int'l, Inc., 975 F.2d 1134, 1137 (5th Cir. 1992). Finally, when considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the district court must examine the complaint to determine whether the allegations provide relief on any possible theory. Cinel v. Connick,15 F.3d 1338, 1341 (5th Cir. 1994).

Id. at 161-62.[19]

With these standards in mind, the Court will first address the complaint and its 11 amendments pursuant to Fed. R. Civ. P 12(b)(1) to determine whether the Court has subject matter jurisdiction based on the allegations of the complaints.

JURISDICTION

Employing the Rule 12(b)(1) standards, the Court finds the following jurisdictional allegations have no merit.

CAFA Jurisdiction

Plaintiffs' invocation of the Class Action Fairness Act, ("CAFA") 28 U.S.C. § 1332(d)(2), based on the fact that the matter in controversy in O'Dwyer exceeds the sum of $5 million, exclusive of interest and costs, ignores salient exceptions thereto-where a defendant is sued in its home state by a class comprised primarily of plaintiffs from that state, where the case involves a purely local controversy, and where the primary defendants are state actors. 28 U.S.C. § 1332(d) (3), (4)

and (5). Subsection 4 mandates a district court decline jurisdiction:

(A) (I) over a class action in which

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate and the primary defendants, are citizens of the State in which

the action was originally filed.

Clearly here, more than two-thirds of the proposed plaintiff classes in the aggregate and primary defendants are citizens of Louisiana, the state in which this action was filed.

Subsection (3) also provides for discretionary abstention the contours of which support this Court's belief that in the interests of justice and looking at the totality of the circumstances it would decline jurisdiction (if it were not so mandated under subsection (4)) since the claims implicate Louisiana intrastate interests, Louisiana law would apply, Louisiana has a distinct nexus with class members, the damages caused and/or sustained were within Louisiana and the primary defendants are all Louisiana citizens save for the United States. Subsection (5) further provides that CAFA jurisdiction shall not apply to any class action in which the primary defendants are States, State officials or other governmental entities against whom the district court may be foreclosed from ordering relief. Thus, there is no CAFA jurisdictional basis for this suit.

Various Federal Statutes

Plaintiffs' wholesale list of federal jurisdictional grounds borders on the absurd, and the Court will address these at this time. Federal courts are duty-bound to examine the basis of subject matter jurisdiction. Union Planters Bank National Assoc. v. Salih, 369 F.3d 457 (5th Cir. 2004) citing Steel Co. v. Citizens for a Better Env't., 523 U.S. 83, 94-95 (1998).

As this Court has previously noted, as stated in Wright & Miller, Federal Practice and Procedure, § 1210:

As is true in the case of pleading a federal question under Section 1331, the entirety of the complaint must support the jurisdictional allegation in a case based on a claim arising under a special federal question statute. Enough should be alleged in the statement of the claim to show that the action does arise under the statute on which it purports to be based. Indeed, it is these statements in the body of the pleading that give the district court subject matter jurisdiction and not the mere conclusory reference to or recitation of a federal statute in the jurisdictional allegations.

Id. at 146.

With this context in mind, the Court will now address the above-noted jurisdictional listing contained in this matter and dispose of the blatantly unsupported allegations. This litany of statutes for which no factual underpinning is provided will not be allowed to stand; as such, the Court finds counsel's action herein verging on sanctionable under Fed. R. Civ. P. 11.

a. The Oil Pollution Act of 1990("OPA"), 33 U.S.C. § 2701

This statute pertains only to the discharge, or threatened discharge of oil upon navigable waters of the United States or adjoining shorelines. OPA imposes liability for the recovery cost and damages that result from an oil spill on:

... each responsible party for a vessel or a facility from

which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable water or adjoining shore line or the exclusive economic zone.

33 U.S.C. § 2701. The statute further requires the all claims for removal costs or damages shall be presented first to the responsible party or guarantor of the source. 33 U.S.C. § 2713(a). A claim under OPA is a "request, made in writing for a sum certain, for compensation for damages or removal causes or resulting from an incident." 33 U.S.C. § 2701(3). The presentation of a claim is a mandatory condition precedent to filing a private lawsuit under OPA. Boca Cigea Hotel, Inc. v. Bouchard Trans. Co. Inc. , 51 F.3d 235 (1 1th Cir.1995). As such, this jurisdictional claim has no merit as this prerequisite has not been fulfilled. Furthermore, the statute does not contemplate the harm alleged herein- damages resulting from a natural disaster and catastrophic occurrence.

b. The Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601, et seq.

CERCLA's primary purpose is to facilitate the prompt clean up of hazardous waste sites by placing the ultimate financial burden on those responsible for creating the harmful condition at a waste site. Cooper v. Armstrong Rubber Company, 1989 WL 60338 (S. D. Miss. 1989). This statute clearly has no bearing on the factual underpinnings of this suit with respect to any of the named defendants and shall be dismissed.

c. The Federal Water Pollution Control Act

("FWPCA") 33 U.S.C. § 1365 and the Clean Water Act ("CWA"), 33 U.S.C. § 1251

These statutes prohibit the discharge of pollutants. To that end, the CWA establishes a permit system and prohibits any discharge without authorization by permit. 33 U.S.C. §§ 1311(a); 1342. Cooper, at * 11, n. 2. A private right of action for citizens is provided for under the CWA at 33 U.S.C. § 1365(a) to sue for the violation of an effluent standard or limitation under the statute.

The CWA requires a 60 day notice of the alleged violation under the CWA to the Administrator of the EPA, the state in which the alleged violation occurred, and to any alleged violator. 33 U.S.C. § 1365(b)(1)(A). To begin, it appears to this Court that this law is not designed to address the facts of the case at hand. This statute addresses on-going pollution concerns, not the alleged results of catastrophic flooding. Furthermore, there are no allegations that the required notice has been provided as has been found to be a condition precedent to jurisdiction. Cooper, at 4. As such, this jurisdictional allegation shall be dismissed.

d. The Clean Air Act

Like the WPA, this statue addresses violations of federal emission standards. It may not be utilized to address wholly past violations of the Act, and it contains a sixty-day notice provision like that found in the WPA. As such, for the same reasons noted above, this jurisdictional invocation shall be dismissed.

e. National Environmental Policy Act of 1969, 42 U.S.C. § 4321, et seq.

"The fundamental purpose of NEPA is to compel federal decision makers to consider the environmental consequences of their actions." Atlanta Coalition on the Transportation Crisis, Inc. v. Atlanta Regional Commission, 599 F.2d 1333 (5th Cir. 1979) citing McGarity, The Courts, the Agencies, and NEPA Threshold Issues, 55 Tex. L.Rev. 801, 804 (1977). Congress did not intend NEPA to apply to state, local, or private actions hence, the statute speaks only to "federal agencies" and requires impact statements only as to "major federal actions. Id. In other words, this provision concerns the requirement of a federal agency to issue an environmental impact statement. The Court is at a loss as to how this statute would provide jurisdiction over any defendant save a United States agency and furthermore, has not been enlightened by plaintiffs' pleadings how this statute was violated. There are no allegations that an Environmental Impact Statement was not rendered. Accordingly, this allegation shall be dismissed.

f. The Toxic Substances Control Act ("TOSCA"), 15 U.S.C. § 2601, et seq.

This statute is designed to regulate the manufacture, distribution, sale, use and disposal of chemical substances which present an unreasonable risk of injury to health or environment. Cooper, at *6 citing 15 U.S.C. § 2605. Again, the 60-day notice is applicable to this statute. As stated in Cooper:

Additionally, the citizen-suit provision of TOSCA only

permits suits against any person "who is alleged to be in violation" of the Act. Consistent with the Supreme Court's interpretation of that phrase in Gwaltney, 108 S. Ct. 376, this action-one for "wholly past" violations-may not be maintained. See Brewer v. Raven, 680 F. Supp. 1176, 1184 (M.D.Tenn. 1988) (relief available only for "ongoing violations of TOSCA).

Id. Accordingly, the allegations based on TOSCA shall be dismissed.

g. The Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901, et seq.

This statute governs "the disposal of solid waste" and does allow actions for past violations. The statute authorizes suit against "any past or present generator, past or present transporter, past or present owner or operator of a treatment, storage or disposal facility who has contributed or is contributing to the past or present handling, storage, treatment, transportation or disposal or any solid or hazardous waste which may present an imminent and substantial endangerment to health or environment." 42 U.S.C. § 6972(a)(1)(B). The case at bar concerns the damages caused by the preparation for and the aftermath of Hurricane Katrina. This statute simply does not address the kinds of harm alleged in this suit and shall be dismissed.

h. Louisiana Environmental Laws

Plaintiffs invoke as a basis for jurisdiction "The Louisiana Environmental Quality Act, the Louisiana Air Control Act, The Louisiana Water Control Law and the Louisiana Oil Spill Prevention and Response Act"

without further explication or citation. The Court has been provided no specific factual allegations or arguments as to how these laws were violated. Louisiana statutes would not provide federal jurisdiction unless the Court would exercise its supplemental jurisdiction under 28 U.S.C. § 1367. The Court will address supplemental jurisdiction at the conclusion of this opinion.

The Court must remind counsel that as a practicing attorney, this kind of buckshot pleading will not be permitted. Counsel is hereby put on notice that any further barrage of meaningless and vituperative rantings and attachment of newspaper clippings to pleadings as "proof" is a waste of this Court's resources. This Court takes its duty to adjudicate the claims of plaintiffs against defendants arising out of Hurricane Katrina as a solemn and weighty duty; pleadings filed in the nature of those by counsel in O'Dwyer belie the seriousness of this matter and frankly make a mockery of the Court's duties to justice and application of the law.

Thus, what remains as a viable basis for federal question jurisdiction with respect to the parties under consideration in this opinion are the allegations of constitutional violations brought against the state actors pursuant to the Fourteenth Amendment and 42 U.S.C. § 1983, 1985, 1986 and 1988. Thus, the Court will now discuss in the context of Fed. R. Civ. P. 12(b)(6), the various motions brought by the City of New Orleans, Ray Nagin both individually and in his official capacity, Eddie Compass, both individually and in his official capacity as Chief of Police, Kimberly Williamson Butler, individually and in her official capacity as Clerk

of Court for the Orleans Parish Criminal District Court, Kathleen Blanco, both individually and in her official capacity as Governor of the State of Louisiana, Eddie Jordan, both individually and in his official capacity as District Attorney for the City of New Orleans based on plaintiffs' allegations concerning constitutional violations under the constitutional amendments noted above and the civil rights statutes noted. The sufficiency of those allegations are suspect and will be addressed in the context of the specific motions filed.

Issues concerning jurisdiction and the sufficiency of the allegations against United States of America, (including the Army Corps of Engineers ("the Corps") and the Federal Emergency Management Agency ("FEMA"), requires a separate analysis and will be addressed hereafter.

The Court will now address the City defendants' Motion to Dismiss.

MOTION TO DISMISS FOR WANT OF STANDING OR, ALTERNATIVELY PURSUANT TO FRCP 12(B)(1), FRCP 12(B)(6) AND FRCP 11(B)(2) WITH INCORPORATED MEMORANDUM IN SUPPORT THEREOF FILED BY THE CITY OF NEW ORLEANS, THE HONORABLE C. RAY NAGIN, MAYOR, AND FORMER SUPERINTENDENT OF POLICE EDWIN COMPASS, III

City Defendants, the City of New Orleans ("the City"), the Honorable C. Ray Nagin ("Mayor Nagin"), and former Superintendent of Police Edwin Compass, III contend that plaintiffs have failed to properly establish standing before the Court. Second, movers maintain

that the complaints fail to aver the basis for the Court's jurisdiction or allege a non-frivolous case or controversy that arises out of federal law, and therefore ought to be dismissed pursuant to Fed. R. Civ. P. 12(b)(1). In the alternative, the movers maintain that plaintiffs have failed to state a cause of action as they have failed to allege that they were deprived of a right, privilege, or immunity secured by the Constitution or laws of the United States making dismissal pursuant to Fed. R. Civ. P. 12(b)(6) proper. Finally, and in the alternative, they maintain that the plaintiffs' claims are legally frivolous and therefore may be dismissed for failure to comply with Fed. R. Civ. P. 11 (b)(2) in that plaintiffs do not supply the Court with a basis for subject matter jurisdiction and the allegations are otherwise without legal merit.

Plaintiffs contend that these defendants are liable to them based on "a number of legal theories against public officials" including incompetence, violation of duty and statute, negligence, gross negligence, malfeasance, misfeasance, non-feasance, and intentional infliction of emotional distress. Plaintiffs further contend that the "torts errors and omissions committed by [these] defendants satisfy the requirements for excepting from immunity from liability because of malicious, intentional, willful, outrageous, reckless or flagrant misconduct. La. Rev. Stat. 9:2798.1(C)(2). In addition, plaintiffs contend that the defendants violated a criminal statute, La. Rev. Stat. 14:134 concerning malfeasance in office.[20]

Section 1983

As the Court has dispensed with the Rule 12(b)(1)

analysis, it will now squarely address the issue of whether plaintiffs have failed to state a claim under federal civil rights law against the City of New Orleans, Ray Nagin both individually and in his official capacity, Eddie Compass, both individually and in his official capacity as Chief of Police, arise under 42 U.S.C. § 1983 which provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. This statute is considered the primary vehicle for brining constitutional claims against local governments and officials.

As this Court stated in Vanderbrook v. Peck, 2004 WL 944518 (E.D.La. April 28, 2004):

There are two essential elements to a § 1983 claim: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States. Parratt v. Taylor, 451 U.S. 527, 535, 1010 S. Ct. 1908, 68 L.Ed. 2d 420 (1981). Furthermore, there must be " direct causal link between the alleged constitutional deprivations and the official conduct by defendants causing the deprivations." Bieros v. Nicola

et al, 839 F. Supp. 332 (E.D.Pa.1993). A § 1983 plaintiff must allege the particular facts of the defendant's conduct in its complaint. Jacquez, 801 F.2d at 793; Rodriguez v. Avita, 871 F.2d 552, 554 (5th Cir.1989); Mills v. Criminal District Court, 837 F.2d 677, 678 (5th Cir. 1988). Conclusory allegations are insufficient for civil rights cases. Shultea v. Wood, 47 F.3d 1427, 1433 (5th Cir.1995).

Id. at *3. Indeed, a plaintiff's complaint is insufficient if it merely contains a litany of conclusory allegations; the causes of action must be pleaded with a certain level of specificity. Causey v. Parish of Tangipahoa, 167 F.Supp.2d 898, 903-04 (E.D.La. 2001).

In Evans v. Department of Housing and Urban Development, 2004 WL 179193 (E.D.La. Jan. 28, 2004), this Court explained that in order to establish a prima facie case under § 1983, plaintiffs must allege either a constitutional violation or a violation of a federal statutory right. See 1 Sheldon H. Nahmod, Civil Rights and Civil Liberties Litigation: The Law of Section 1983, at 56 (3d ed.1991).

If the plaintiff alleges a violation of a constitutional right, the plaintiff must prove that the defendant's conduct was the cause of the constitutional deprivation. The plaintiff may allege violation of the Fourteenth Amendment, procedural due process or equal protection, as well as other violations of provisions in the Bill of Rights that apply to the states. Id. at 56-57. If the plaintiff alleges a violation of a federal statutory right, he or she must also prove that the defendant's conduct was the cause of this statutory deprivation. Id at 57. Regardless of whether a plaintiff alleges a

constitutional or statutory deprivation, or both, he or she must demonstrate that the challenged conduct was undertaken "under color of state law;" meaning that the individuals acted in an official capacity and in a manner authorized by state law. Price v. Housing Authority of New Orleans, 2002 WL 31308421 at *4 (E.D.La. Oct. 11, 2002).

As to the suit against Mayor Nagin in his official capacity and Police Chief Compass in his official capacity, a suit against a government official in his official capacity is treated as a suit against the entity-here the City of New Orleans. See Lee v. Morial, 2000 WL 726882 at *2 (E.D.La. June 2, 2000). Thus, the analysis is the same for the City, the Mayor and Police Chief Compass. Furthermore, no liability exists for governmental entities based on a vicarious liability or a respondeat superior theory. Price v. Housing Authority of New Orleans, 2002 WL 179193 (E.D.La. Oct. 11, 2002) Instead the municipality will be liable only when an official policy or custom inflicts the injury of which the plaintiff complains. Evans at *6.

Using plaintiffs'" counts" as set out above, the following allegations have been made as the basis for plaintiffs claims:

(1) failure to order timely evacuation of critical care patients in hospitals;
(2) failure to ensure competent design, construction, maintenance and inspection of the levee systems for the Industrial Canal, the London Avenue Canal and the Seventeenth Street Canal;

(3) failure to timely stop the flooding in New

Orleans;

(4) failure to secure the water supply to Orleans Parish causing increased fires;

(5) failure to protect the public from "urban terrorists";

(6) failure to safeguard the identification records and criminal records of convicted sex offenders, including rapists and pedophiles, and "injected" these individuals into the refugee population at the Louisiana Superdome and convention Center;

(7) failure to safeguard the contents of the evidence room at Criminal District Court;

(8) failure to safeguard the names of identifying prisoners who were in Orleans Parish prison; and

(9) failure to prevent the pollution of the environment of the territory.

Simply put, none of these allegations of "wrong-doing" constitute a violation of the United States Constitution, its Amendments or any federal statute.[21] Plaintiffs have not identified or articulated with specificity the particular plaintiffs allegedly harmed or the constitutional rights impeded by the actions outlined in the various "counts" of the suit. Furthermore, they have not alleged with any specificity that the defendants had an official policy or custom which inflicted injury on any specific plaintiff. Thus, plaintiffs have failed to state a cause of action against the City of New Orleans, Mayor Nagin in his official capacity and Police Chief Compass

in his official capacity, and the Motion to Dismiss will be granted in this regard.

Mayor Nagin and Police Chief Compass in their Individual Capacities

Plaintiffs also alleged those same defalcations against Mayor Nagin and Police Chief Compass in their individual capacity. "Personal capacity suits which seek to impose individual liability upon a government officer for actions taken under color of state law are recognized under § 1983." Toga Society, Inc. v. Lee, 2004 WL 2357733 (E.D.La. Oct. 20,2004); Hafer v. Meloi, 502 U.S. 21, 25 (1991).

As noted by this Court in Toga:

A state official can be sued in his individual capacity and be held personally liable under § 1983 if it can be shown that the official, acting under color of state law, caused the deprivation of a federal right. Hafer, 502 at 25-31. However, such persons are entitled to assert personal immunity defenses such as objectively reasonable reliance on existing law or qualified immunity.

Id. at * 1.

To determine liability, a court must "determine whether plaintiff has alleged the violation of a constitutional right. Second, if the plaintiff has alleged a constitutional violation, the court must decide if the conduct was objectively reasonable in light of clearly established law at the time the challenged conduct occurred." Glen v. City of Tyler, 242 F.3d 307, 313 (5th

Cir. 2001). While the issue of whether a constitutional violation has been alleged is considered to be preliminary, a court may pretermit that issue and determine whether the alleged violations were ones clearly established at the time of the occurrence. Ebanks v. Stalder, 1995 WL 769726 (E.D.La. Dec. 27, 1995) citing Siegert v. Gilley, 500 U.S. 226 (1991). "A right is 'clearly established' where "the contours of a right asserted are sufficiently clear that a reasonable official would understand that what he is doing violates that right.... If reasonable public officials could differ on the lawfulness of the defendant's actions, the defendant is entitled to qualified immunity." Ebanks, at *6 citing White v. Taylor, 959 F.2d 539, 544 (5th Cir. 1992) (citations omitted).

In the case as bar, the Court has already noted its belief that no constitutional violation has been alleged. Furthermore, taking the Seigert approach, plaintiffs fail to demonstrate how any of the conduct alleged was not objectively reasonable in light of clearly established law at the time the challenged conduct occurred. The City Defendants were faced with a natural disaster of catastrophic proportions. The nine enumerated "defalcations" do not constitute conduct that reasonable public officials would reasonable conceive violated a clearly establish constitutional right. Only if these action cross this threshold would this suit survive qualified immunity against the Mayor and the Police Chief.[22]

One other dimension of the original complaint bears discussion. At page 9, Article II(E), plaintiffs contend that they sustained mental suffering and emotional distress as a result of the "government's ultra vices acts

such as claimed mandatory evacuation due to exigent circumstances' ... and deprivation of food and water to hungry and thirsty so-called "hold-outs" who remained in the City because the U.S. Constitution give them the right to bear arms and protect their property at their own risk...." Also as plaintiffs have cited to the Fifth Amendment, the Court must consider whether these allegations would state a claim for a violation for a person's right to life, liberty or property.

To begin, the allegations as to which of the plaintiffs herein were forced to evacuate and who were not are absent in the actual complaints and amending complaints.[23] As to the issue of whether plaintiffs' rights "to bear arms and protect their property" were violated, La. Rev. Stat. 29:277(D) provides that a local disaster or emergency may be declared by the parish president or in this instance, the Mayor. Once that power is utilized, he is empowered under this Louisiana statute to "direct and compel the evacuation of all or part of the population from any stricken or threatened area withing the boundaries of the parish if he deems this action necessary for mitigation, response or recovery measure." La. Rev. Stat. 29:277(F)(5). This act does not require a predeprivation hearing and the law in general does not require one when the state or here, the municipality, acts to avert an imminent catastrophe. Obviously, the Mayor could have believed he had police powers to protect the public safety by ordering the evacuation. Thus, a reasonable official in his position would not understand that what he was doing violated a right. Assuming he did violate a constitutional right, which the Court is unprepared to find, the City defendants would be entitled to qualified immunity. Miller v. Campbell County Wyoming, 722 F.Supp. 687,

696 (D. Wyoming 1989); Ebanks, at *6 citing White v. Taylor, 959 F.2d 539, 544 (5th Cir. 1992) (citations omitted).

As to this second issue-the Fifth Amendment-the court in Massachusetts Coalition of Citizens with Disabilities v. Civil Defense Agency and Office of Emergency Preparedness of the Commonwealth of Mass., 649 F.2d 71 (1st Cir. 1981) found that the Due Process Clause does not provide the right that an evacuation plan should guarantee the safety of all residents. "That clause provides that the states may not deprive their citizens of life, liberty, or property without due process of law." In enacting an evacuation plan and in implementing that plan, Mayor Nagin and Police Chief Compass did not deprive any person of life liberty or property, rather they attempted to do the opposite-provide some degree of protection against a threat to life the source of which threat was not the state. Id. at 78. As such, the claims under the Fifth Amendment fail as well.

Accordingly, pursuant to the City Defendants' motion, all constitutional claims brought pursuant to § 1983 and its progeny will be dismissed. Thus, the only claims remaining against these defendants are the multitudinous state law claims over which the Court might have jurisdiction under its supplemental jurisdiction which will be addressed after the other substantive motions are considered.

MOTION TO DISMISS PURSUANT TO F.R.C.P. 12(B)(6) FILED BY KIMBERLY WILLIAMSON BUTLER, IN HER INDIVIDUAL CAPACITY AND AMENDED MOTION TO DISMISS PURSUANT TO

F.R.C.P. 12(B)(6) FILED BY KIMBERLY WILLIAMSON BUTLER, IN HER INDIVIDUAL AND OFFICIAL CAPACITY

Kimberly Williamson Butler ("Butler") moves the Court for dismissal of those claims pertaining to her individually and in her official capacity as Clerk of Criminal District Court, Parish of Orleans, State of Louisiana. Plaintiffs have noted that Counts VI, VII and VIII contain the allegations made against her. Thus, the Court must examine if a claim has been stated under federal law for:

(6) failure to safeguard the identification records and criminal records of convicted sex offenders, including rapists and pedophiles, and injecting these individual into the refugees at the Louisiana Superdome and Convention Center;

(7) failure to safeguard the contents of the evidence room at Criminal District Court; and

(8) failure to safeguard the names of (sic) identifying prisoners who were in Orleans Parish.

Plaintiffs[24] contend that these actions constitute criminal malfeasance, over which this Court neither has jurisdiction, nor about which plaintiffs have any right to prosecute. In addition plaintiffs seek civil damages for Butler's "willful failure to fulfill the duties of her office by failing to safeguard the contents of the evidence room at Criminal District Court, and criminal records, as Hurricane KATRINA approached the New Orleans metropolitan area." Plaintiffs' Memorandum in Opposition to Motion to Dismiss Filed on Behalf of the

Clerk of Criminal Court at 5.

Using the same analysis the Court employed with respect to the City Defendants, the Court finds that plaintiffs' have failed to state a cause of action against Butler. As to a cause of action against her in her official capacity, these allegations do not constitute constitutional wrongs. As to a cause of action against her in her individual capacity, even if there were a constitutional violation, her conduct was objectively reasonable in light of clearly established law at the time the challenged conduct occurred. No one had ever experienced the flooding that occurred as a result of Katrina and Butler's conduct, while unfortunate, cannot be found to be actionable. As with any politician, in the event that the populace believes that an official did not execute his or her duties properly, the populace votes that individual out of office. That outcome is that which occurred here and no liability will lie in this regard. Thus, the Motion to Dismiss will be granted in this regard and the issue of supplemental jurisdiction over these claims will be addressed at the end of this opinion.

MOTION TO DISMISS DEFENDANT GOVERNOR KATHLEEN BLANCO AND THE STATE OF LOUISIANA [25]

Governor Kathleen Blanco, individually and in her official capacity as the Governor of the State of Louisiana and the State of Louisiana have moved for the dismissal of this matter with respect to the alleged violations of 42 U. S. C. § 1983. In plaintiffs' opposition to these motions, they cite to Counts 1, 2, 3, 5, and 9 as being applicable to the Governor and the State. The Court finds that the motions to dismiss have merit.

Sovereign Immunity

The Court cannot entertain jurisdiction over the Governor of the State of Louisiana in her official capacity and the State of Louisiana as they are protected from suit by the doctrine of sovereign immunity as found in the Eleventh Amendment of the Constitution.[26] By statute, the State of Louisiana has not waived its sovereign immunity for suits brought in federal court based on violations of "constitutional, civil and human rights." Richardson v. Southern University, 118 F.3d 450, 453 (5th Cir. 1997); La. Rev. Stat. 13:5106(A).[27] Thus, the Eleventh Amendment bars suit against a state entity such as the Governor in her official capacity and the State of Louisiana itself. As such, the claims against them shall be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

Qualified Immunity

Likewise, for the same reasons noted with respect to the City defendants, the Court finds that Governor Blanco in her individual capacity is entitled to qualified immunity as concerns any cause of action brought pursuant to 28 U.S.C. § 1983. Clearly, Governor Blanco's actions were objectively reasonable in light of clearly established law at the time these alleged violations occurred. She had to confront a catastrophic occurrence unlike anything experienced by any state official before, except perhaps the Great Flood of 1927. Thus, the Motion to Dismiss all causes of action brought pursuant to § 1983 shall be granted. Again, as to the remaining state law claims, these allegations will be addressed infra.

MOTION TO DISMISS ON BEHALF OF EDDIE JORDAN, INDIVIDUALLY AND IN HIS ELECTED CAPACITY AS THE DISTRICT ATTORNEY FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA

Eddie Jordan, individually and in his elected capacity as the District Attorney for the Parish of Orleans, State of Louisiana seeks dismissal for lack of jurisdiction, lack of standing and failure to state a cause of action for which relief can be granted. For the same reasons as set forth with respect to the City Defendants, the Motion to Dismiss shall be granted in so far as the Court lacks subject matter jurisdiction as set forth above and as to the § 1983 claims, plaintiffs have failed to state a claim as required under Fed. R. Civ. P. 12(b)(6). It appears that no memorandum in opposition was filed in this matter, and that no supplemental briefing dealing with the Eleventh Amended Complaint was filed. Nonetheless, the Court will dispose of the federal causes of action in this manner and will discuss supplemental jurisdiction over the state law claims infra.

UNITED STATES' MOTION TO DISMISS

The United States has moved pursuant to Fed. R. Civ. P. 12(b)(1) and 12(h)(3) to dismiss plaintiffs' action for lack of subject matter jurisdiction. The Court has reviewed the pleadings and exhibits and finds the motion to have merit.

In these proceedings, as previously noted, plaintiffs have amended their complaint eleven times. Leave to file the twelfth amendment was denied. Plaintiffs have

conclusorily alleged a panoply of federal statutes most of which have been dismissed by this Court in this opinion. In their initial memorandum, plaintiffs' primary basis for jurisdiction was the Suits in Admiralty Act, ("SAA"), 46 U.S.. C. § 742 based on the anticipated filing of a Twelfth Supplemental and Amending Complaint. Since the Twelfth Supplemental and Amending Complaint was not allowed to be filed, this jurisdictional allegation is not before the Court. The SAA, if it were applicable here, does not require the exhaustion of administrative remedies before filing suit; however, since it is not before the Court, the Court will not address it. The Court will address this alleged basis for jurisdiction in the Motion to Dismiss filed in Maureen O'Dwyer v. The United States of America, C.A. No. 06-1885 (Doc. 662 in these consolidated proceedings).[28] Thus, the remaining claims are fundamentally tort claims which require a determination whether plaintiffs have exhausted their administrative remedies under the Federal Tort Claim, 28 U.S.C. § 1346(b), 2671 et seq. ("FTCA").

It must be noted that although the allegations of the primary complaint are not discrete as to the United States, clearly plaintiffs are alleging that various offenses and quasi-offenses have been committed by the United States Government through the acts or defalcations of the Corps and/or FEMA. It should be further noted that this action is not a Bivens[29] claim, as no individual federal agents or employees have been named. Lawrence v. St. Bernard Police Dept., 2000 WL 1182615 (E.D.La. Aug. 18, 2000).

Under the FTCA, 28 U.S.C. § 2675(a), an action may not be instituted against the United States unless the

claimant first presents the claim to the appropriate federal agency and the agency has denied the claim in writing. If the claim is not finally disposed of within six months, the claimant may treat the claim as denied and file suit in federal court. The United States claims that plaintiffs have not complied with these jurisdictional prerequisites.

Plaintiffs have made the following submissions to the United States:

1. On October 12, 2005, plaintiffs submitted a handwritten letter to the United States Army Corps of Engineers with copies of plaintiffs' complaints in C. A. Nos. 05-4181 and 05-4237.

2. On January 10, 2006, plaintiffs sent a Form SF-95 to the United States Army Corps of Engineers, New Orleans District, Office of Counsel. This was apparently received by the agency on January 24, 2006. (Motion to Dismiss, Doc. 108, Aff. of Angela Gene Drinkwitz, Par. 3) (hereinafter "Aff. of Drinkwitz"). The Court has examined this form, and it appears to be Mr. O'Dwyer's personal claim and an attempt to make a claim on behalf of the other putative class members.

3. January 24, 2006, the Corps also received a supplemental claim submitted on a Form SF-95, with a cover letter signed by Mr. O'Dwyer dated January 16, 2006. (Aff. of Drinkwitz, Par. 4).

4. January 31, 2006, the Corps received another SF-95 purporting to be an administrative claim for Mrs. Maureen O'Dwyer. The claim was signed by Mr. O'Dwyer as her legal representative. No power of

attorney, contract or other document was forwarded to signify Mr. O'Dwyer's legal representation of Mrs. O'Dwyer (Aff. of Drinkwitz, Par. 5).

This suit was filed on September 19, 2005, the United States Army Corps of Engineers being made defendant therein. On October 7, 2005, in the Second Supplemental and Amending Complaint, FEMA was added. It does not appear that any administrative claim has been lodged against FEMA to date.

Only two of the named plaintiffs' claims as outlined above could be regarded as possibly sufficient to place the Corps on notice as detailed in the statute and the Code of Federal Regulations. Specifically that would be the claims by Mr. O'Dwyer, individually, and that of his sister (without any contract, power of attorney, etc.). Any purported attempt to make a claim by any other plaintiff named in this action under the FTCA is woefully deficient. Thus, the Court pretermits any discussion as to whether the administrative prerequisites of suit can be satisfied by the proper claims of the named class representative, as oppose to each individual that might comprise the putative class.[30]

In McNeil v. United States, 508 U.S. 106, 133 S. Ct. 1980 (1993), the Supreme Court held that a suit filed before the six-month interval must be dismissed even after the six-month period had run. The Court stated:

Every premature filing of an action under the FTCA imposes some burden on the judicial system and on the Department of Justice which must assume the defense of such actions. Although the burden may be slight in an individual case, the statute governs the processing of

a vast multitude of claims. The interest in orderly administration of a body of litigation is best served by adherence to the straight - forward statutory command.

Id. at 112, 1984.

This case has involved a plethora of pleadings and incidental motions, but it has not made substantial progress. Therefore the Court must grant the United States' motion and dismiss plaintiffs' suit without prejudice as against the United States as premature both as regards the Corps and FEMA. This procedural dictate is perhaps not the most practical and efficient method of administering this behemoth before the Court, but it is what the law requires. Plaintiff(s) must refile this suit as against the United State, assuming that each has given appropriate notice to the United States under the FTCA as set for in the statute and the regulations. Plaintiffs must bear in mind, that at most, only two notices as noted above, might meet those prerequisites.[31]

SUPPLEMENTAL JURISDICTION

At this juncture, there remains before the Court in this matter all of the state law claims alleged against all the moving parties herein. As noted above, the Court finds that there is no subject matter jurisdiction for the majority of the claims alleged, and furthermore, as to the only extent federal jurisdictional claims-that is the civil rights claims alleged, plaintiffs have failed to state a claim against any of the moving defendants. Thus, as to the remaining state law claims, the court has jurisdiction under 28 U.S.C. § 1367(a), which allows a federal court to exercise supplemental jurisdiction over

all other claims that are so related to claims in the action having original jurisdiction that they form the same case or controversy." 28 U.S.C. 1367(a). Because the Court has dismissed plaintiffs' federal based claims, the remaining state law claims have no independent jurisdictional basis. Thus, as provided by 28 U.S.C. § 1367(c), a court, in its discretion, may decline to exercise supplemental jurisdiction over a claim when it has "dismissed all claims over which it has original jurisdiction. This Court hereby exercises its discretion and declines to exercise supplemental jurisdiction over any of the state law claims brought against the moving defendants. Accordingly,

IT IS ORDERED that the Motion to Dismiss for Want of Standing or, Alternatively Pursuant to FRCP 12(b)(1), FRCP 12(b)(6) and FRCP 11(b)(2) with Incorporated Memorandum in Support Thereof filed by the City of New Orleans, the Honorable C. Ray Nagin, Mayor, and former Superintendent of Police Edwin Compass, III (Doc. 104) is GRANTED dismissing for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) all federal claims alleged except with respect to the constitutional or civil rights claims, dismissing with prejudice for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) all claims brought pursuant to 42 U.S.C. § 1983, et seq., and dismissing without prejudice all state law claims as this Court has declined to exercise its supplemental jurisdiction thereto.

IT IS FURTHER ORDERED that the Motion to Dismiss Pursuant to F.R.C.P. 12(b)(6) filed by Kimberly Williamson Butler, in her individual capacity (Doc. 105) and the Amended Motion to Dismiss Pursuant to F.R.C.P. 12(b)(6) filed by Kimberly

Williamson Butler, in her individual and official capacity (Doc. 110) is GRANTED dismissing for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) all federal claims alleged except with respect to the constitutional or civil rights claims, dismissing with prejudice for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) all claims brought pursuant to 42 U.S.C. § 1983, et seq., and dismissing without prejudice all state law claims as this Court has declined to exercise its supplemental jurisdiction thereto.

IT IS FURTHER ORDERED that the Motion to Dismiss Defendant Governor Kathleen Blanco (Doc. 106) and the Motion to Dismiss Defendant State of Louisiana (Doc. 107) is GRANTED dismissing for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) all federal claims alleged except with respect to the constitutional or civil rights claims, dismissing with prejudice for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) all claims brought pursuant to 42 U.S.C. § 1983, et seq., and dismissing without prejudice all state law claims as this Court has declined to exercise its supplemental jurisdiction thereto.

IT IS FURTHER ORDERED that the Motion to Dismiss on Behalf of Eddie Jordan, Individually and in his Elected Capacity as the District Attorney for the Parish of Orleans, State of Louisiana (Doc.109) is GRANTED dismissing for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) all federal claims alleged except with respect to the constitutional or civil rights claims, dismissing with prejudice for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) all claims brought pursuant to 42 U.S.C. § 1983, et seq., and dismissing without prejudice all state law claims as this

Court has declined to exercise its supplemental jurisdiction thereto.

IT IS FURTHER ORDERED that the United States' Motion to Dismiss (Doc. 108) is GRANTED dismissing these claims without prejudice as prematurely brought. IT IS FURTHER ORDERED that the Motion to Dismiss filed by Aaron Broussard, individually and in his official capacity as President for the Parish of Jefferson and Jefferson Parish is MOOT as these defendants are no longer defendants in this suit.

IT IS FURTHER ORDERED finding no just cause for delay, pursuant to Fed. R. Civ. P. 54(b), judgment shall be entered in favor of the City of New Orleans, Ray Nagin both individually and in his official capacity, Eddie Compass, both individually and in his official capacity as Chief of Police, Kimberly Williamson Butler, individually and in her official capacity as Clerk of Court for the Orleans Parish Criminal District Court, Kathleen Blanco, both individually and in her official capacity as Governor of the State of Louisiana, Eddie Jordan, both individually and in his official capacity as District Attorney for the City of New Orleans and the United States and against plaintiffs dismissing their claims as set forth herein.

New Orleans, Louisiana, this 19th day of July, 2006.

Footnotes

[1]The City of New Orleans also filed a subsequent Motion to Dismiss for Failure to State a Claim (Doc. 200) with respect to the following cases: C.A. No. 05-6327, 05-6073, 05-5237, and 05-6314. The Court will

address this other motion in a subsequent order; this ruling is intended as an adjudication as to the issues contained in the O'Dwyer matter.

[2]Indeed, the initial complaint consists of a 56 page hand-written document which is practically illegible by virtue of its meanderings and notations which literally fill the pages without margins with writings that are perpendicular to the lines of the paper on which the pleading is written.

[3]By order of this Court, the claims against Aaron Broussard, individually and in his official capacity as President for the Parish of Jefferson and Jefferson Parish were severed from this suit and assigned a separate case number, that is Abel v. Broussard, C.A. No. 06-1640. A Motion to Dismiss these parties (Doc. 13) had been filed prior to the severance; however, another Motion to Dismiss (Doc. 15)was filed in Abel and granted (Doc. 20). Thus, the Motion to Dismiss in O'Dwyer (Doc. 13) is MOOT.

[4] Supplemental jurisdiction pursuant to 28 U.S.C. § 1367 is proper term to use; the Court will discuss this basis for jurisdiction at the conclusion of this opinion.

[5]These allegations were added in the Eleventh Supplemental Amending Complaint. (Doc. 78). Neither can plaintiffs bring a criminal action, nor can a private right of action be derived therefrom. Evans v. Dept. of Housing and Urban Dev. 2004 WL 179193, *5 (E.D.La. Jan. 28, 2004). Thus, this jurisdictional allegation is devoid of merit and will not be addressed again.

[6]The First Supplemental and Amending Complaint contains additional plaintiffs and added the Sewerage and Water Board. (Doc. 3). The Second Supplemental and Amending Complaint added FEMA as defendant and another group of plaintiffs. (Doc. 5). The Third Supplemental and Amending Complaint added the

Jefferson Parish allegations which as previously noted were severed and dismissed. (Doc. 7) The Fourth Supplemental and Amending Complaint added plaintiffs, a Jefferson Parish classification, an additional jurisdictional basis discussed infra, and more vituperative allegations of misfeasance on the part of Mayor Nagin. (Doc. 12). The Fifth Supplemental and Amending Complaint added additional plaintiffs and the classification of those injured by the Mississippi Gulf River Outlet ("MRGO"). (Doc. 16). The Sixth Supplemental and Amending Complaint broadens the allegations to include plaintiffs in New Orleans East and classification for those harmed by the Industrial Canal in conjunction with MRGO. Williamson and the Louisiana Department of Transportation and Development were added by this document. (Doc. 20). The Seventh Supplemental and Amending Complaint added more plaintiffs and Eustis Engineering Company, Inc. and Modjeski and Masters, Inc. as defendants. (Doc. 23). The Eight Supplemental and Amending Complaint (Doc. 50), the Ninth Supplemental and Amending Complaint (Doc.123) and the Tenth Supplemental and Amending Complaint (Doc. 124) all simply add new individually named plaintiffs. The Eleventh Supplemental and Amending Complaint added plaintiffs, an insurance company in lieu of "ABC Insurance Company" for the New Orleans Levee Board, and more bases for jurisdiction which will be discussed infra, as well as various other bases for "compensation" from state defendants. (Doc. 128).

[7] It will be noted that the initial complaint contains an inordinate amount of irrelevant rhetoric which has no place in any legal pleading. Counsel for plaintiffs is on notice that any further diatribes such as:

Plaintiffs long for the days in the City of New Orleans and in the State of Louisiana when certain behavior was simply UNACCEPTABLE TO POLITE, RESPECTFUL, LAW-ABIDING CITIZENRY. Plaintiffs long for the days when the citizenry, black and white, would not tolerate idleness, drug use or crime-a land in which children knew their father's last name, because he lived in a house which he had acquired through his own industry....

will not be tolerated and may subject him to sanctions. (Doc.1,Complaint at p. 47.)

[8]This amendment provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

[9]This amendment provides:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation. U.S. Const. amend. V.

[10] This amendment states in relevant part that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV.

[11] This statute provides," The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the Untied States." 28 U.S.C. § 1331.

[12] This statute provides for the instances where the district courts of the United States have jurisdiction over the United States. 28 U.S.C. § 1346 including the Federal Tort Claims Act and Tucker Act provisions which will be discussed infra.

[13]These statutes also provide the procedures to proceed against the United States under the Federal Tort Claims Act. 28 USC § 2571.

[14]This "citation" is overly broad and incomprehensible. While the Court assumes that this refers to the Civil Rights Act contained in Title 42 of the United States Code, such an amorphous citation without more specificity renders this jurisdictional basis a nullity in the Court's eyes.

[15] This statute provides a civil action for deprivation of rights and will be discussed infra.

[16]This statute provides a cause of action for a conspiracy to interfere with civil rights.

[17]This statute provides a cause of action for neglecting to prevent the interference with civil rights.

[18]This statute provides for federal jurisdiction, attorneys' fees and expert fees for civil right violations.

[19]The Court recognizes that the City Defendants have also moved for dismissal pursuant to Rule 11 of the Federal Rules of Civil Procedure. However, as will be discerned from the Court's analysis, this basis need not be addressed as Rule 12(b)(1) and (6) provide sufficient grounds for dismissal.

[20] Counsel for plaintiffs filed a pleading on March 15, 2006 in response to a Supplemental Memorandum filed by the City Defendants. In this memorandum, counsel describes the details of Michael Cormick's forced evacuation and the alleged arrest of counsel himself. He then contends that because "boilerplate" arguments were used in that Supplemental Memorandum that came from another civil action, that he can do no better than to incorporate by reference the constitutional arguments made by counsel in that other action and "respectfully directs" the Court to those pleadings. Such arguments and incorporation by reference to pleadings filed in another case is meaningless, unacceptable and contrary to the rules and workings of this Court.

[21] In one of the innumerable supplemental memoranda filed by counsel, he opines that one Michael Cormick:

. . was forcibly removed from his home in Uptown New Orleans, at gunpoint, by members of the Louisiana National Guard, on Tuesday or Wednesday, August 30 or 31, 2005. Mr. Cormick had survived the storm with his person and his home intact, had plenty of food and water, and had no need for anyone's assistance, nor did he request any assistance. Nevertheless, he was forcibly removed from his home and transported out of the City, entirely against his will.

At 0005 hours on Tuesday September 20, 2005, within 12-hours of having filed this lawsuit, the undersigned was a victim of criminal trespass on his property by members of the Louisiana State Police, who handcuffed the undersigned with his hands behind his back, and threw him on the ground, causing injuries. During this "encounter", repeated requests for information, such as "Am I under arrest"; "What are the nature of the

charges against me, if any?" and "What is going on here", were met by silence or instructions to "Shut the___up". Thereafter the Louisiana State Police kidnaped the undersigned and turned custody over to employees of the Louisiana Department of Corrections,. . . .

Doc. 157 in O'Dwyer v. United States, C.A. No. 05-4181. These allegations obviously do not implicate any of the City defendants considered in this section of this opinion; rather, it would appear to be against the Louisiana National Guard and the Louisiana State Police, neither of which have been named as defendants.

[22] Furthermore, the Court notes that in order to survive a qualified immunity defense, a plaintiff must articulate specific conduct and action giving rise to a constitutional violation. Mahrous v. O'Brien, 1998 WL 166189, *1-2 (E.D.La. April 8, 1998), citing Shultea v. Wood, 47 F.3d 1427, 1434 (5th Cir.1995). While Shultea normally requires a court to allow plaintiffs to respond to the allegations of qualified immunity pursuant to Fed.R.Civ.P. 7(a), the Court finds that considering the eleven supplemental and amending complaints and the numerous oppositions and supplemental oppositions filed in response to this and the other motions, the Court will not order nor allow a Shultea response to be filed with respect to any of the motions filed herein.

[23] Mr. Cormick's and Mr. O'Dwyer's allegations are not contained in the pleadings and again do not implicate the defendants under consideration herein as both were "harmed" by state police and/or the National Guard.

[24] Again, plaintiffs' memorandum in opposition to this motion contains statements like "It is truly remarkable that elected and appointed public officials and the

government bodies which they have responsibility for operating competently seem to think that they bear absolutely no legal responsibility to anyone for their criminal malfeasance and willful misconduct in discharging the duties of their offices." Such editorializing is pointless and unprofessional, considering that in a 12 page brief, the Court is graced with precious little law citation other than a page of citation from Black's law dictionary, citation to a criminal statute, and the self same litany of jurisdictional bases including the Clean Water Act and the Clean Air Act with respect to the Clerk of Criminal Court. At page 11 of this filing, counsel cites Judge Porteous' denial of a Motion to Dismiss in Berthelot v. Boh Brothers, C.A. No. 054182 rendered with respect to James Construction Group, L.L.C. Counsel fails to comprehend that with respect to federal claims brought pursuant to civil rights laws, constitutional violations must be stated in non-conclusory form.

[25] While the Department of Transportation for the State of Louisiana ("DOTD") was added in the Sixth Amending and Supplemental Complaint, the State of Louisiana did not include them in this particular motion, except in a reply memorandum. There is a separately filed and noticed motion concerning the DOTD (Doc. 321). As a result, the Court will forego an analysis with respect to that entity until it addresses that particular motion.

[26]The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

[27] No suit against the state or a state agency or political subdivision shall be instituted in any court other than a

Louisiana state court." La. Rev. Stat. 13:5106(A).

[28] The Court would note nonetheless that it appears that the SAA is not applicable to these proceedings for the well-stated reasons set forth by Judge Berrigan in In re Matter of the Complaint of Ingram Barge Co., 2006 WL 1539787 (E.D.La. May 25, 2006).

[29]Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999 (1971).

[30]In re Agent Orange Prod. Liab. Litig., 8181 F.2d 194, 198 (2nd Cir. 1984).

[31] Clearly the provisions of the Tucker Act, 28 U.S.C. § 1346(a)(2) do not apply because Mr. O'Dwyer seeks $2 million and his sister seeks $2, 950,000.00.

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No. 08-882

Supreme Court, U.S.
FILED
APR 17 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MAUREEN O'DWYER, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

MAUREEN O'DWYER
pro se

5939 Vicksburg Street,
New Orleans, LA 70124
(504) 484-1053

CURRY & TAYLOR • (202) 393-4141

GROUNDS FOR PETITION FOR REHEARING

Petitioner avers that the grounds for this Petition for Rehearing comply with the provisions of Rule 44(2) of the Supreme Court Rules, because intervening circumstance of a substantial or controlling effect, or to other substantial grounds not previously presented to this Honorable Court, exists, namely:

> The erroneous rulings in the Courts below were "tainted" by judicial misconduct in the Courts below, all as is meticulously set forth in separate Complaint(s) of Judicial Misconduct filed in the United States Court of Appeals for the Fifth Circuit on April 14, 2009 and on April 16, 2009, respectively, attached as Exhibit Nos. 1 and 2.

ARGUMENT

The underlying case being the subject of this Petition for Rehearing is part of the "Victims of KATRINA" litigation which originated in the United States District Court for the Eastern District of Louisiana, with a decision adverse to Petitioner in the District Court being appealed to the United States Court of Appeals for the Fifth Circuit. Petitioner only recently "connected the dots" to identified serious judicial misconduct in both the District Court and the Court of Appeals. See Exhibit Nos. 1 and 2.

In short, the District Court and the Court of Appeals are hopelessly corrupted and polluted, not only by judicial misconduct, which violated Federal Judges' oaths of office and the Canons contained in the "Code of Conduct for United States Judges," but which also involves violation of multiple sections of Title 18, United States Code. Petitioner respectfully submits that the issues raised in this Petition for Rehearing require the exercise of this Court's supervisory jurisdiction so that the confidence of the public in the independence and integrity of the entire Federal judicial process will be maintained, rather than shaken to its very foundations.

Respectfully submitted,
Maureen O'Dwyer
In propria persona
5939 Vicksburg Street
New Orleans, LA 70124
Telephone: (504) 228-5939

CERTIFICATION OF PETITIONER

COMES NOW Petitioner herein, and certifies that the foregoing Petition for Rehearing of the Order Denying Petitioner's Petition for Writ of Certiorari complies with Rule (44) of this Honorable Court, and that same is limited to the requirements thereof. Petitioner herein further certifies that this Petition is presented in good faith and not an attempt in delay.

Respectfully submitted,

Maureen O'Dwyer

Exhibit 1 US Court of Appeals for the Fifth Circuit, Complaint(s) of Judicial Misconduct filed 4/14/2009

COMPLAINT(S) OF JUDICIAL MISCONDUCT

COMES NOW Ashton R. O'Dwyer, Jr., appearing *in propria persona* pursuant to the provisions of the "Rules Governing Complaints of Judicial Misconduct," who does declare under penalty of perjury, pursuant to the provisions of 28U.S.C. §1746, the truth and correctness of the following:

1. That the following Judges of the United States Court of Appeals for the Fifth Circuit[1] are guilty of judicial misconduct by virtue of the violation of their oath of office, violation of the Canons contained in the "Code of Conduct for United States Judges," as well as conspiracy to commit same:

James L. Dennis in Case Nos. 08-30052, 07-30349, and 08-30362;
Rhesa H. Barksdale in Case No. 08-30052;
Emilio M. Garza in Case No. 08-30052;
Thomas M. Reavely in Case No. 08-30052;
Carolyn Dineen King in Case Nos. 07-30349 and 08-30362; and

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[1] Complainant acknowledges the probability that other Federal officials, such as members of the Court's or the Judges' Staff, are also guilty of misconduct; however, no complaint against those officials is being made at this time.

Jennifer Walker Elrod in Case Nos. 07-30349 and 08-30362.

2. The misconduct complained of herein took place during the pendency of the referenced cases at New Orleans, Louisiana, and where the Judges maintain their offices, if elsewhere than New Orleans.

3. The misconduct complained of herein consisted of prohibited *ex parte* communications between and among the Judges identified herein and all or some of the following, which communications were known by the Judges to be prohibited, because they involved the merits of the cases identified herein and how the outcome(s) in those cases could be improvidently influenced by others:

a) One or more members of the Louisiana Supreme Court, including particularly, but without limitation, now Chief Justice Catherine D. Kimball, and/or her surrogates, and/or the surrogates of other members of the Louisiana Supreme Court;

b) One or more employees of the Office of Disciplinary Counsel for the Louisiana Supreme Court, including particularly, but without limitation, Chief Disciplinary Counsel Charles B. Plattsmier, Jr., and/or his surrogates, and/or the surrogates of other employees of the Office of Disciplinary Counsel;

c) Employees of the State of Louisiana, including particularly, but without limitation, employees of the Louisiana Department of Justice and/or State employees within the Executive, Judicial and/or

Legislative Branches of Louisiana State Government, and/or their surrogates;

d) Members of the Plaintiffs' Bar of the State of Louisiana, including particularly, but without limitation, those Members of the Plaintiffs' Bar who represent the interests of plaintiffs, claimants and potential class members in the "Victims of KATRINA" litigation pending in the United States District Court for the Eastern District of Louisiana, but who simultaneously represented the interests of the State of Louisiana between August 29, 2007 and October 9, 2008, and/or Members of the Louisiana Bar who signed fee-sharing agreements with such Plaintiffs' Bar members, and/or any of their surrogates;

e) Members of the United States District Court for the Eastern District of Louisiana and/or Members of the Staff of that Court, including particularly, but without limitation, Stanwood R. Duval, Jr. and his spouse and law clerk, Janet Daley Duval, and/or their surrogates; and

f) Other members of the United States Court of Appeals for the Fifth Circuit and/or their surrogates.

4. In support of these complaints of misconduct, and to specifically avoid running afoul of Rules 2(D) and 3(D) of the Rules Governing Complaints of Judicial Misconduct, Complainant incorporates herein by reference thereto the following Exhibits, copies of which will be submitted if requested by the Chief Judge:

Exhibit No. 1 – Transcript of Statement given under Penalty of Perjury by Ashton R. O'Dwyer, Jr., to the Louisiana Department of Justice on October 14, 2005;

Exhibit No. 2 – Record Document No. 114 in Civil Action 06-7280, in the Eastern District of Louisiana, being the Complaint in that action;

Exhibit No. 3 – Sworn Affidavit of Complainant's Law Enforcement Expert, David R. Kent, dated August 20, 2007;

Exhibit No. 4 – Sworn Affidavit of Complainant's Law Enforcement Expert, David R. Kent, directed to the issue of discovery dated, December 19, 2007;

Exhibit No. 5 – Unsworn Declaration Under Penalty of Perjury made pursuant to 28 U.S.C. §1746 by Complainant's Law Enforcement Expert, David R. Kent, on March 4, 2009;

Exhibit No. 6 – Complainant's Un-refuted Motion to Strike False and Defamatory Allegations in Case No. 08-30052;

Exhibit No. 7 – Judge Dennis' Order of September 22, 2008, summarily denying Exhibit No. 6;

Exhibit No. 8 – Complainant's Motion for Disclosure in Case No. 08-30052;

Exhibit No. 9 – Complainant's E-mail to Deputy Clerk Michael Brown, in Case No. 08-30052, referencing Complainant's Motion for Disclosure by Judge Dennis;

Exhibit No. 10 – The Court's Order of December 18, 2008, summarily denying Exhibit No. 8;

Exhibit No. 11 – Complainant's correspondence in Case No. 08-30052 to the Clerk of the 5th Circuit dated September 24, 2008;

Exhibit No. 12 – Complainant's November 10, 2008 correspondence in Case No. 08-30052 to the Clerk of 5th Circuit; and

Exhibit No. 13 – Complainant's Petition for Panel Rehearing and/or for Rehearing En Banc in Case No. 08-30052, together with attached Exhibits.

Complainant avers that the Chief Judge should not act on the complaints alleged herein without review of the Exhibits identified *supra*, which Complainant is prepared to submit to the Chief Judge, if requested, but which are not attached hereto in order to avoid running afoul of the provisions of Rules 2(D) and 3(D) of the Rules Governing Complaints of Judicial Misconduct.

5. Complainant further avers that the Court's decisions in Case Nos. 08-20052, 07-30349 and 08-30362 were the result of judicial misconduct, and at least peripherally related to the following issues in Civil Action No. 06-7280 and 05-4182 (and consolidated cases) pending in the United States District Court for the Eastern District of Louisiana:

1) A criminal gangland-style "hit" which was executed by the Louisiana State Police against Complainant at five minutes past midnight on September 20, 2005, on orders from persons employed

by the Louisiana Department of Justice, by the Louisiana Supreme Court and by the Office of Disciplinary Counsel for the Louisiana Supreme Court;

2) A patently obvious non-consentable, concurrent conflict of interests on the part of certain so-called prominent Members of the Plaintiffs' Bar who simultaneously represented plaintiffs, claimants and potential class members in the "Victims of KATRINA" litigation bearing Civil Action No. 05-4182 (and consolidated cases) in the U.S. District Court for the Eastern District of Louisiana, as well as the interests of the State of Louisiana, between August 29, 2007 and October 9, 2008[2];

3) Bias, prejudice and partiality, and other judicial misconduct, warranting the recusal of Stanwood R. Duval, Jr., in the "Victims of KATRINA" litigation[3]; and

4) Claims asserted by Complainant and his clients against the State of Louisiana, its agencies and instrumentalities, political subdivisions, and individual department heads, in the "Victims of KATRINA" litigation.

6. By virtue of their having participated in prohibited *ex parte* communications as described, *supra*, and allowing those communications to influence their decision-making on the merits in the referenced cases, the Judges identified herein each violated the

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[2] This issue is articulately pleaded in Civil Action N0. 08-4728 on the Eastern District docket.

[3] Ibid.

following Canons contained in the Code of Conduct for United States Judges:

Canon 1 - was violated by each of the accused Judges, who made a mockery of the terms "independent," "honorable," "justice," "high standards of conduct," and "integrity," as a result of the misconduct alleged herein.
Canon 2(A) - was violated by each of the accused Judges, because they neither respected nor complied with the law, and because the misconduct alleged herein is the antithesis of acting "at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."
Canon 2(B) - was violated by each of the accused Judges, because they allowed social or other relationships to influence their judicial conduct and judgment, and because they not only conveyed to others the impression that they were in a special position of influence, and did nothing to stop that impression, but then acted in an official capacity to advance the private interests of others.
Canon 3(A)(1) - was violated by each of the accused Judges, because not only did they make a mockery of the terms "faithful" and "professional competence in the law," but they permitted their decision-making to be dictated by partisan interests.
Canon 3(A)(4) - was violated by each of the accused Judges, because they engaged in prohibited *ex parte* communications with others on the merits, and procedures affecting the merits, of proceedings pending before them. Judges Dennis, Barksdale, Garza, and Reavely also violated Canon 3(A)(4) by conspiring with others to deny Complainant oral argument in Case No. 08-30052. Judges Dennis, King and Elrod also violated

Canon 3(A)(4) by conspiring with others to deny Complainant oral argument in Case No. 08-30362.
Canon 3(B)(1), (2), and (3) - were violated by each of the accused Judges, because they took no action after learning of misconduct by Brother and/or Sister Judges, Court officials and Staff, lawyers and others.

7. The Complaints of judicial misconduct contained herein are not made for the purpose of seeking review of the erroneous decisions involving Complainant and his clients by the Judicial Council of the Fifth Circuit,[4] but rather to instill public confidence in the integrity and independence of judges, and to ensure that judges comply with their oath of office, the law, and the applicable Code of Conduct.

8. More to the point, Complainant avers that although reasonable minds might conclude that the misconduct alleged herein is peripherally related to merits of the decisions in the referenced cases, Complainant specifically avers that his allegations of misconduct are NOT DIRECTLY RELATED TO the decisions in those cases, but rather to the lack of integrity of the accused Judges and of those who wrongfully influenced them.

9. Complainant avers that the Chief Judge should appoint a Special Committee (or Committees) to investigate these complaints and to make recommendations to the Judicial Council. Notwithstanding, this requested relief, Complainant avers that he has no confidence in the ability of the

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[4] However, Complainant avers that judicial review of the erroneous decisions is absolutely warranted under the facts and circumstances.

Chief Judge of the United States Court of Appeals for the Fifth Circuit, any Special Committee which may be appointed by the Chief Judge, or of the Judicial Council of the Fifth Circuit to competently, fairly and impartially investigate and decide the merits of the complaints of misconduct contained herein. In support of these assertions, Complainant refers to the September 28, 2007 Order of Reprimand and Reasons by the Judicial Council in the matter involving former Judge Samuel B. Kent who, since the referenced Order of Reprimand and Reasons, and more particularly on February 23, 2009, pleaded guilty of one count of obstruction of justice, thus demonstrating the abject incompetency of the judicial misconduct process within the Fifth Circuit. Complainant further avers that any investigation(s) by the Special Committee or Committees should also include the appointment of competent forensic experts to analyze office computers, personal computers and blackberries, as well as telephone records, of the accused Judges and others, in order to "test" their answers to questions under oath with extrinsic electronic and documentary evidence.

10. Complainant declares that the allegations, averments and statements contained herein are true and correct under penalty of perjury pursuant to the provisions of 28 U.S.C. §1746.

Exhibit 2 US Court of Appeals for the Fifth Circuit, Complaint(s) of Judicial Misconduct filed 4/16/09

COMPLAINT(S) OF JUDICIAL MISCONDUCT

COMES NOW Ashton R. O'Dwyer, Jr., appearing *in propria persona* pursuant to the provisions of the "Rules Governing Complaints of Judicial Misconduct," who does declare under penalty of perjury, pursuant to the provisions of 28U.S.C. §1746, the truth and correctness of the following:

1. That the following Judges of the United States Court of Appeals for the Fifth Circuit[5] are guilty of judicial misconduct by virtue of the violation of their oath of office, violation of the Canons contained in the "Code of Conduct for United States Judges," as well as conspiracy to commit same:

James L. Dennis[6] in Case Nos. 06-30840, 06-30841, and 08-30234
Jacques L. Weiner, Jr., in Case No. 08-30234.
W. Eugene Davis in Case Nos. 06-30840 and 06-30841.
Edward C. Prado in Case No. 08-30234.

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[5] Complainant acknowledges the probability that other Federal officials, such as members of the Court's or the Judges' Staff, are also guilty of misconduct; however, no complaint against those officials is being made at this time.

[6] Complaint(s) of Judicial Misconduct against Dennis were filed on April 14, 2009 in three other cases. The "common denominator" in the clear majority of cases in which Judicial Misconduct is complained about is the name "James L. Dennis," which Complainant avers is a statistical impossibility unless Dennis is guilty of the conduct complained of herein beyond all reasonable doubt.

Leslie L. Southwick in Case Nos. 06-30840 and 06-30841.
Will Garwood in Case No. 08-30234.
Ron Clark[7] in Case Nos. 06-30840 and 06-03841.

2. The misconduct complained of herein took place during the pendency of the referenced cases at New Orleans, Louisiana, and where the Judges maintain their offices, if elsewhere than New Orleans.

3. The misconduct complained of herein took place during the pendency of the referenced cases at New Orleans, Louisiana, and where the Judges maintain their offices, if elsewhere than New Orleans.

4. The misconduct complained of herein consisted of prohibited *ex parte* communications between and among the Judges identified herein and all or some of the following, which communications were known by the Judges to be prohibited, because they involved the merits of the cases identified herein and how the outcome(s) in those cases could be improvidently influenced by others:

g) One or more members of the Louisiana Supreme Court, including particularly, but without limitation, now Chief Justice Catherine D. Kimball, and/or her surrogates, and/or the surrogates of other members of the Louisiana Supreme Court;

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[7] District Judge from the Eastern District of Texas, who sat on the United States Court of Appeals for the 5th Circuit by designation.

h) One or more employees of the Office of Disciplinary Counsel for the Louisiana Supreme Court, including particularly, but without limitation, Chief Disciplinary Counsel Charles B. Plattsmier, Jr., and/or his surrogates, and/or the surrogates of other employees of the Office of Disciplinary Counsel;

i) Employees of the State of Louisiana, including particularly, but without limitation, employees of the Louisiana Department of Justice and/or State employees within the Executive, Judicial and/or Legislative Branches of Louisiana State Government, and/or their surrogates;

j) Members of the Plaintiffs' Bar of the State of Louisiana, including particularly, but without limitation, those Members of the Plaintiffs' Bar who represent the interests of plaintiffs, claimants and potential class members in the "Victims of KATRINA" litigation pending in the United States District Court for the Eastern District of Louisiana, but who simultaneously represented the interests of the State of Louisiana between August 29, 2007 and October 9, 2008, and/or Members of the Louisiana Bar who signed fee-sharing agreements with such Plaintiffs' Bar members, and/or any of their surrogates;

k) Members of the United States District Court for the Eastern District of Louisiana and/or Members of the Staff of that Court, including particularly, but without limitation, Stanwood R. Duval, Jr. and his spouse and law clerk, Janet Daley Duval, and/or their surrogates; and

l) Other members of the United States Court of Appeals for the Fifth Circuit and/or their surrogates.

5. In support of these complaints of misconduct, and to specifically avoid running afoul of Rules 2(D) and 3(D) of the Rules Governing Complaints of Judicial Misconduct, Complainant incorporates herein by reference thereto the following Exhibits, copies of which will be submitted if requested by the Chief Judge:

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Exhibit No. 3 – Sworn Affidavit of Complainant's Law Enforcement Expert, David R. Kent, dated August 20, 2007;

Exhibit No. 4 – Sworn Affidavit of Complainant's Law Enforcement Expert, David R. Kent, directed to the issue of discovery dated, December 19, 2007;

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Exhibit No. 7 – Judge Dennis' Order of September 22, 2008, summarily denying Exhibit No. 6;

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Exhibit No. 10 – The Court's Order of December 18, 2008, summarily denying Exhibit No. 8;

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Complainant avers that the Chief Judge should not act on the complaints alleged herein without review of the Exhibits identified *supra*, which Complainant is prepared to submit to the Chief Judge, if requested, but which are not attached hereto in order to avoid running afoul of the provisions of Rules 2(D) and 3(D) of the Rules Governing Complaints of Judicial Misconduct.

6. Complainant further avers that the Court's decisions in Case Nos. 06-30840, 06-30841, and 08-30234 were the result of judicial misconduct, and at least peripherally related to the following issues in Civil Action No. 06-7280 and 05-4182 (and consolidated cases) pending in the United States District Court for the Eastern District of Louisiana:

1) A criminal gangland-style "hit" which was executed by the Louisiana State Police against Complainant at five minutes past midnight on September 20, 2005, on orders from persons employed by the Louisiana Department of Justice, by the Louisiana Supreme Court and by the Office of Disciplinary Counsel for the Louisiana Supreme Court;

2) A patently obvious non-consentable, concurrent conflict of interests on the part of certain so-called prominent Members of the Plaintiffs' Bar who simultaneously represented plaintiffs, claimants and potential class members in the "Victims of KATRINA" litigation bearing Civil Action No. 05-4182 (and consolidated cases) in the U.S. District Court for the Eastern District of Louisiana, as well as the interests of the State of Louisiana, between August 29, 2007 and October 9, 2008[8];

3) Bias, prejudice and partiality, and other judicial misconduct, warranting the recusal of Stanwood R. Duval, Jr., in the "Victims of KATRINA" litigation[9]; and

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[8] This issue is articulately pleaded in Civil Action N0. 08-4728 on the Eastern District docket.

[9] Ibid.

4) Claims asserted by Complainant and his clients against the State of Louisiana, its agencies and instrumentalities, political subdivisions, and individual department heads, in the "Victims of KATRINA" litigation.

7. By virtue of their having participated in prohibited *ex parte* communications as described, *supra*, and allowing those communications to influence their decision-making on the merits in the referenced cases, the Judges identified herein each violated the following Canons contained in the Code of Conduct for United States Judges:

Canon 1 - was violated by each of the accused Judges, who made a mockery of the terms "independent," "honorable," "justice," "high standards of conduct," and "integrity," as a result of the misconduct alleged herein.
Canon 2(A) - was violated by each of the accused Judges, because they neither respected nor complied with the law, and because the misconduct alleged herein is the antithesis of acting "at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."
Canon 2(B) - was violated by each of the accused Judges, because they allowed social or other relationships to influence their judicial conduct and judgment, and because they not only conveyed to others the impression that they were in a special position of influence, and did nothing to stop that impression, but then acted in an official capacity to advance the private interests of others.
Canon 3(A)(1) - was violated by each of the accused Judges, because not only did they make a mockery of

the terms "faithful" and "professional competence in the law," but they permitted their decision-making to be dictated by partisan interests.

Canon 3(A)(4) - was violated by each of the accused Judges, because they engaged in prohibited *ex parte* communications with others on the merits, and procedures affecting the merits, of proceedings pending before them. Judges Davis, Southwick and Clark also violated Canon 3(A)(4) by conspiring with others to deny Complainant oral argument in Case Nos. 06-30840 and 06-30841. Judges Weiner, Prado and Southwick also violated Canon 3(A)(4) by conspiring with others to deny Complainant oral argument in Case No. 08-30234.

Canon 3(B)(1), (2), and (3) - were violated by each of the accused Judges, because they took no action after learning of misconduct by Brother and/or Sister Judges, Court officials and Staff, lawyers and others.

8. The Complaints of judicial misconduct contained herein are not made for the purpose of seeking review of the erroneous decisions involving Complainant and his clients by the Judicial Council of the Fifth Circuit,[10] but rather to instill public confidence in the integrity and independence of judges, and to ensure that judges comply with their oath of office, the law, and the applicable Code of Conduct.

9. More to the point, Complainant avers that although reasonable minds might conclude that the misconduct alleged herein is peripherally related to merits of the decisions in the referenced cases, Complainant specifically avers that his allegations of

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[10] However, Complainant avers that judicial review of the erroneous decisions is absolutely warranted under the facts and circumstances.

misconduct are NOT DIRECTLY RELATED TO the decisions in those cases, but rather to the lack of integrity of the accused Judges and of those who wrongfully influenced them.

10. Complainant avers that the Chief Judge should appoint a Special Committee (or Committees) to investigate these complaints and to make recommendations to the Judicial Council. Notwithstanding, this requested relief, Complainant avers that he has no confidence in the ability of the Chief Judge of the United States Court of Appeals for the Fifth Circuit, any Special Committee which may be appointed by the Chief Judge, or of the Judicial Council of the Fifth Circuit to competently, fairly and impartially investigate and decide the merits of the complaints of misconduct contained herein. In support of these assertions, Complainant refers to the September 28, 2007 Order of Reprimand and Reasons by the Judicial Council in the matter involving former Judge Samuel B. Kent who, since the referenced Order of Reprimand and Reasons, and more particularly on February 23, 2009, pleaded guilty of one count of obstruction of justice, thus demonstrating the abject incompetency of the judicial misconduct process within the Fifth Circuit. Complainant further avers that any investigation(s) by the Special Committee or Committees should also include the appointment of competent forensic experts to analyze office computers, personal computers and blackberries, as well as telephone records, of the accused Judges and others, in order to "test" their answers to questions under oath with extrinsic electronic and documentary evidence.

11. Complainant declares that the allegations, averments and statements contained herein are true and correct under penalty of perjury pursuant to the provisions of 28 U.S.C. §1746.